United Nations

A/C.6/59/SR.17

General Assembly

Fifty-ninth session

Official Records

Distr.: General
6 December 2004
English
Original: Spanish

Sixth Committee

Summary record of the 17th meeting

Held at Headquarters, New York, on Monday, 1 November 2004, at 9.30 a.m.

Chairman: Mr. Bennouna .... (Morocco)
later: Mr. Dhakal (Vice-Chairman) .... (Nepal)

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04-58113 (E)

The meeting was called to order at 9.40 a.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (A/59/10)

1. **The Chairman** recalled the contribution made by the International Law Commission to the progressive development of international law and its codification in accordance with the provisions of Article 13 of the Charter of the United Nations, and welcomed the progress made by the Commission with regard to the various items on its agenda.

2. **Mr. Melescanu** (Chairman of the International Law Commission) said the Commission dealt with several very complicated topics at the same time, which required understanding not only of developments in the current year but also the proceedings of previous years. The Commission therefore encouraged Governments to submit comments in writing, after examining those topics more carefully. The Commission relied on the Sixth Committee for advice from Governments and information on State practice, when that information was not readily available. The Commission's success in the codification of international law therefore depended to a large extent on the support it received from the Committee. Turning to the report of the Commission on the work of its fifty-sixth session (A/59/10), he said he would concentrate on Chapters IV, VII and XI.

3. With regard to Chapter IV (Diplomatic protection), the Commission had considered the fifth report of the Special Rapporteur covering several outstanding matters, completed its consideration of the remaining 19 draft articles proposed by the Special Rapporteur, and subsequently adopted the 19 draft articles on first reading.

4. In accordance with articles 16 and 21 of the statute of the Commission, the draft articles had been transmitted, through the Secretary-General, to Governments for comments and observations, with the request that the latter be submitted to the Secretary-General by 1 January 2006. It was the Commission's intention to complete the second reading of the draft articles at its fifty-eighth session later that year, taking into account any comments and observations member Governments might wish to make.

5. The 19 draft articles were divided into four parts. Part one, entitled "General Provisions", contained articles 1 and 2, dealing respectively with the definition and scope of the draft articles and the right to exercise diplomatic protection. The text of the articles remained substantially the same as that adopted in 2002, with the exception of some rearrangement between paragraphs.

6. Part Two, entitled "Nationality", had been restructured into three chapters. Chapter I, entitled "General Principles", contained article 3, paragraph 1, of which established that the State entitled to exercise diplomatic protection was the State of nationality. That was the basic premise of the draft articles. Paragraph 2, in turn, referred to the exceptions to the nationality principle contained in article 8, which dealt with the exercise of diplomatic protection on behalf of non-nationals.

7. Chapter II of Part Two was entitled "Natural Persons" and contained draft articles 4 to 8, which had been adopted by the Commission in 2002. Article 4 defined the State of nationality for the purposes of diplomatic protection of natural persons; article 5 dealt with the continuous nationality requirement for the exercise of diplomatic protection; articles 6 and 7 dealt with the complex situation of multiple nationality and claims against a third State (art. 6) or against a State of nationality (art. 7). Article 8 provided the two exceptions, in the case of stateless persons and refugees to the basic rule, set out in article 3, that only the State of nationality could exercise diplomatic protection.

8. While the Commission had made some minor drafting changes, the provisions remained largely the same. The only substantive change to that group of articles related to the continuous nationality principle in articles 5, 7 and 8. The Commission had considered the suggestion made by a member Government that the end point for the requirement of continuous nationality be changed from the time of the "official presentation" of the claim to the date of "resolution" of the claim, as had been decided in the *Loewen* case, in the context of the North American Free Trade Agreement (NAFTA). However, the Commission, while acknowledging the position taken by the tribunal in that case, was nonetheless of the view that the draft articles dealt with the entitlement of a State to exercise diplomatic protection and such exercise of diplomatic protection could not be subject to some future date of resolution

of the dispute. It therefore preferred to retain the date of official presentation of the claim as the pertinent point in time. It should, however, be noted that there was support in the Commission, as reflected in paragraph (5) of the commentary to article 5, for the proposition that an individual ceased to be a national for the purposes of diplomatic protection if he changed his nationality between the date of the official presentation of the claim and the making of an award or the handing down of a judgement. The Commission encouraged Governments which had not yet expressed views in that regard to do so.

9. Chapter III of Part Two, entitled "Legal Persons", contained articles 9 to 13, which had been considered and adopted by the Commission in the current year. Article 9 dealt with the question of the State of nationality of a corporation for the purposes of diplomatic protection. The structure of the provision had been modelled on article 4, its counterpart for natural persons.

10. Article 10 applied the continuous nationality principle to the exercise of diplomatic protection in respect of a corporation; earlier comments on the appropriate date until which nationality must be continuous in the case of natural persons likewise applied in that context. The article had been drafted in the form of two paragraphs, the first establishing the basic rule, the second containing a proviso, namely that the State continued to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as a result of the injury, had ceased to exist according to the law of the State and could not therefore satisfy the continuous nationality requirement. Paragraph 2 should, however, be read in conjunction with article 11, paragraph (a), which made it clear that the State of nationality of the shareholders would not be entitled to exercise diplomatic protection in the case of an injury to the corporation which had led to its demise.

11. Article 11 recognized the basic principle, affirmed by the International Court of Justice in the *Barcelona Traction* case, that the State of nationality of the shareholders in the corporation was not entitled to exercise diplomatic protection on their behalf in the case of injury solely to the corporation. There had been some discussion the previous year in the Sixth Committee and the Commission as to whether exceptions to that basic proposition should be recognized. In the end the Commission had decided to adopt two exceptions allowing the State of nationality of the shareholders to exercise diplomatic protection on their behalf for injury caused to the corporation: where the corporation had ceased to exist for a reason unrelated to the injury; and where the corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury and incorporation under the law of the latter State was required by it as a precondition for doing business there. The Commission had considered the two exceptions with caution, cognizant of the fact that their inclusion had been a source of contention for some delegations in the Sixth Committee. Article 11 sought to strike a balance, recognizing the possibility for the State of nationality of the shareholders to intervene in cases where it was the corporation that had been injured, while seeking to place appropriate limitations on that possibility. He referred interested delegations to the commentary to article 11, particularly paragraph (3) and onwards, for more discussion of the exceptions.

12. Article 12 had been included as a saving clause to protect the interests of shareholders in instances where their rights had been directly injured by an internationally wrongful act. In such a scenario, the State of nationality of any such shareholders would be entitled to exercise diplomatic protection on their behalf. That provision had also been based on the decision of the International Court of Justice in the *Barcelona Traction* case and was considered by the Commission to be relatively uncontroversial.

13. Thus far the chapter on the diplomatic protection of legal persons, with the exception of article 12, dealt with the position of corporations, because corporations tended to have certain common features and engaged in foreign trade and investment and were therefore more likely to be the subject of an international dispute involving the exercise of diplomatic protection. Article 13, on the other hand, contemplated the applicability of the provisions relating to corporations (articles 9 and 10) to other legal persons, as appropriate. The article had been intentionally drafted without specifying the extent to which those provisions would apply, in recognition of the diversity of other legal persons. It had been considered preferable to state the basic point that the principles pertaining to corporations contained in the draft articles would have to be adjusted in order to take that diversity into account. It would then be for a court to determine which principles in fact applied to other legal persons.

14. Part Three dealt with the exhaustion of local remedies and contained three articles, articles 14, 15 and 16, all of which had been adopted by the Commission the previous year. The only issue that had arisen in the current year in relation to Part Three had to deal with a refinement to article 14 laying down the basic rule. The Commission had decided to replace the original reference in paragraph 2 to remedies existing "as a right" with "legal remedies". The original reason for the inclusion of the phrase "as a right" had been to exclude from the scope of the rule those discretionary mechanisms of conflict resolution which did not necessarily guarantee the possibility of resolving the dispute. The Commission had, however, accepted the observation made during the previous year's debate in the Sixth Committee that the phrase might exclude certain types of appeal which were within the discretion of the court in question, such as the *certiorari* process before the United States Supreme Court. Articles 15 and 16 dealt with the categorization of claims for purposes of the exhaustion of local remedies rule and with the exceptions to that rule, respectively. No changes had been made to those articles

15. Part Four, entitled "Miscellaneous Provisions", contained articles 17, 18 and 19, all of which had been considered for the first time in the current year. All three were concerned less with rules on the exercise of diplomatic protection than with how such rules related to other rules of international law. Article 17 was a saving clause designed to preserve the rights of States, individuals or other entities to resort to procedures other than diplomatic protection, including, for example, universal or regional human rights treaties, to secure redress for injury suffered as a result of an internationally wrongful act.

16. Article 18 recognized that alternative, special regimes for the protection of foreign investors, as provided for in bilateral and multilateral investment treaties, took precedence over the general regime of diplomatic protection. However, such precedence existed only where, and to the extent that, the regimes were inconsistent with each other.

17. Article 19 dealt with the protection of ships' crews and affirmed the right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf, while acknowledging that the State of nationality of the ship also had a right to seek redress on behalf of such crew members, irrespective of their nationality, when they had been injured in the course of an injury to the ship resulting from an internationally wrongful act.

18. Chapter VII (International liability for injurious consequences arising out of acts not prohibited by international law) contained the text of the eight draft principles. The Commission would welcome observations on the final form. It had been suggested that draft articles would be the counterpart, in both form and substance, to the draft articles on prevention. In favour of draft principles, it was contended that different characteristics of particular hazardous activities might require the adoption of different approaches with regard to specific arrangements; moreover, the choices or approaches adopted could vary under different legal systems or might depend on the different stages of economic development of the countries concerned. In the final analysis, the Commission had concluded that the recommended draft principles would have the advantage of not requiring a potentially unachievable harmonization of national laws and legal systems. Moreover, it was perceived that wide acceptance of the substantive provisions would be more feasible through draft principles. However, as noted in the footnote to the title of the draft principles, the Commission had reserved the right to reconsider the matter on second reading, in the light of the comments and observations of Governments.

19. The Commission would also appreciate written comments and observations from Governments on the commentaries to the draft principles. It should be noted that the commentaries contained an explanation of the scope and context of each draft principle, as well as an analysis of relevant trends and possible options available to assist States in the adoption of appropriate national implementation measures and in the elaboration of specific international regimes.

20. In preparing the draft principles, the Commission had proceeded on the basis of a number of basic understandings, which also reflected the general views expressed previously in the Sixth Committee's debates, and in written comments from Governments. First, the draft principles offered a legal regime that was general and residual in character and without prejudice to the relevant rules of State responsibility.

21. Second, the scope of the liability aspects was the same as the scope of the draft articles on prevention of

transboundary harm from hazardous activities, which the Commission had adopted in 2001. Thus, the same threshold of "significant", applicable in the case of the draft articles on prevention, was also applicable in respect of the draft principles. In addition, the Commission had considered whether the examination of the topic should extend to issues concerning global commons. However, considering that issues associated with the latter were different and had their own particular features, the Commission, reaffirming conclusions reached at its 2002 session, had decided that those issues required separate treatment.

22. Third, the draft principles reflected certain policy considerations. In the main, it was recognized that the activities contemplated for coverage within the draft principles were essential for economic development and beneficial to society. At the same time, it was important that prompt and adequate compensation for the innocent victims was provided in the event that such activities gave rise to transboundary damage. Moreover, in order to minimize damage, it was necessary that contingency plans and response measures should be in place, over and above those contemplated in the draft articles on prevention.

23. Fourth, the draft principles sought to attach liability primarily to the operator. Such liability would be without proof of fault, and could be limited or subject to exceptions, taking into account social, economic and other policy considerations. Models of existing liability and compensation regimes revealed that State liability was more of an exception than the rule. However, the attachment of primary liability to the operator was not intended to absolve the State from discharging its own duties of prevention under international law.

24. Fifth, the title "Draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities" reflected the new approach taken by the Commission, shifting the prior emphasis on State liability and conceptualizing the topic in terms of State cooperation, with substantial regard for the "polluter pays" principle. Although there was a shift away from State liability, the Commission had taken full cognizance of the extensive damage often caused by hazardous activities and the fact that the operator's liability would be limited. Thus, it had been considered appropriate to envisage the provision of supplementary funding, seeking to spread the loss among multiple actors, including the State, as appropriate.

25. Turning to the text of the draft principles, the draft preamble was self-explanatory. It contextualized the draft principles within the relevant provisions of the Rio Declaration on Environment and Development, in particular principles 13 and 16. Thus, it stressed the need to develop national law on liability and compensation, and to achieve cost internalization, taking into account the "polluter pays" principle.

26. Draft principle 1, entitled "Scope of application", established that the draft principles had the same scope as the draft articles on prevention. Thus, they related to activities not prohibited by international law which involved a risk of causing significant transboundary harm through their physical consequences. The phrase included four criteria. All the elements — human causation, risk, extraterritoriality, and the physical element — had been taken from the draft articles on prevention. The word "transboundary" qualified "damage" to stress the transboundary orientation of the draft principles.

27. Draft principle 2 concerned the use of terms. Paragraph (a) defined damage, whose eligibility for compensation required reaching a particular threshold, a requirement that was not without precedent. For example, the *Trail Smelter* award concerned the "serious consequences" of the operation of the smelter, while the *Lake Lanoux* award dealt with serious injury. A number of instruments had also referred to "significant", "serious" or "substantial" harm or damage as the threshold for a legal claim. "Significant" had also been used in other legal instruments and domestic law. For the purpose of the draft principles, damage had to be "significant". The term was understood to refer to something more than "detectable", but did not need to be "serious" or "substantial". The determination of "significant damage" would involve factual and objective criteria and a value determination.

28. The definition of damage was also crucial, since its elements were relevant in establishing the basis for a claim. The elements of damage included damage caused to persons, property or the environment. Subparagraphs (i) and (ii) covered loss of life or personal injury and property damage, including aspects of pure economic loss, such as loss of income directly related to the injury or deriving from the property. It also covered aspects of cultural heritage, which could be State property.

29. Subparagraphs (iii) to (v) addressed aspects concerning claims that were usually associated with damage to the environment, as defined in paragraph (b). Loss or damage by impairment under subparagraph (iii) also covered loss of income in respect of such impairment. The Commission had decided to provide a broader definition of environment, which seemed justified by the general and residual character of the draft principles. Moreover, the acceptable remedial responses, as reflected in subparagraphs (iv) and (v), namely "costs of reasonable measures of reinstatement" and reasonable costs of "clean-up" associated with the "costs of reasonable response measures", seemed limited albeit modern concepts. Recent treaty practice had tended to acknowledge the importance of such measures, but had left it to domestic law to indicate who might be entitled to take them.

30. Paragraph (c) defined "transboundary damage" and accentuated the extraterritorial context of the draft principles. The incidents falling within the scope of the draft principles could have victims within both the State of origin and the States of injury. Therefore, within the scheme of the draft principles, it was considered important to anticipate the disbursement of funds for victims who suffered damage in the State where the incident occurred. The 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage envisaged such a system.

31. Paragraph (d) defined hazardous activity as any activity that entailed a risk of causing transboundary harm through its physical consequences. The draft principles, like the draft articles on prevention, did not apply to transboundary harm caused by State policies in monetary, socio-economic or similar fields.

32. Paragraph (e) provided a functional definition of operator. Channelling liability to a single entity, whether operator or owner, was the hallmark of strict liability regimes. Thus, some person other than the operator could be specially identified as liable, depending on the interests involved in respect of a particular hazardous activity.

33. Draft principle 3, entitled "Objective", set forth the essential aim of the draft principles. The notion of liability and compensation for victims was duly reflected in principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration. It was also perceived from the perspective of achieving cost internalization, thus according efficacy to the "polluter pays" principle, as reflected in principle 16 of the Rio Declaration. Although that principle found expression in a number of international instruments, judicial decisions and arbitral awards, the Commission was well aware of its limitations and had taken them into account.

34. Three essential elements could be extrapolated from draft principle 3. The first related to the need to ensure prompt and adequate compensation to victims. That aspect had been a constant from the inception of discussions on the topic. However, as noted in paragraph (1) of the commentary, the draft principles had other objectives. The second element related to the notion that "victim", a term which had not been formally defined, encompassed both natural and legal persons, including States. The involvement of States became prominent in pursuing claims for environmental damage. The third element concerned the notion that transboundary damage included damage to the environment. The extent to which damage to the environment was covered had to be determined in the context of the terms used in draft principle 2.

35. Draft principle 4, entitled "Prompt and adequate compensation", was another key provision. In a general sense, the draft principle accentuated four concepts which found support in treaty practice and domestic legislation. First, each State should take measures to establish liability regimes under its domestic laws for activities within its jurisdiction. Secondly, that liability regime should include the imposition of liability on the operator or, where appropriate, other person or entity, without requiring proof of fault. Those strict criteria echoed the "polluter pays" principle. Thirdly, the requirement for proof without fault might be subject to conditions, limitations or exceptions. Thus, for example, in most cases where liability was without proof of fault compensation was limited. The limitation might not apply, for instance, if there was proof of negligence or recklessness on the part of the operator. Moreover, liability might be excepted when, for instance, the damage had been the result of armed conflict, hostilities, civil war or insurrection or the result of a natural phenomena. All those elements were supported by treaty practice and domestic legislation. The Commission, however, considered it essential to stress that any such conditions, limitations or exceptions should not be inconsistent with the general principle that the victim should not be left alone to

bear loss, in accordance with draft principle 3. The second and third concepts were reflected in paragraph 2. Fourthly, the draft principle sought to integrate various forms of securities, insurance and funding mechanisms to provide sufficient financial guarantees for the provision of prompt and adequate compensation, in accordance with paragraphs 3 and 5. The need for financial guarantees to cover claims for compensation could not be overemphasized. Such guarantees might take the form of financial security deposits, insurance or bonds. Paragraph 4 established a second tier of supplementary funding mechanism, financed by the industry concerned. Paragraph 5 anticipated a third tier of funding in the event that the measures provided in paragraphs 3 and 4 were insufficient to provide adequate compensation. While paragraph 5 did not directly require the State to set up government funds to guarantee prompt and adequate compensation, it did require the State to ensure that additional financial resources were allocated.

36. Draft principle 5, entitled "Response measures", responded to the policy consideration that any contingency plans and response measures must go beyond those contemplated in the draft articles on prevention. The envisaged role of the State was complementary to that provided for in draft articles 16 and 17 of the draft articles on prevention, which dealt with obligations relating to emergency preparedness and notification of emergency. The importance of taking prompt and effective response measures also applied to States that had been, or might be, affected by the transboundary damage. While no operational sequence was contemplated in the phrase "States, if necessary with the assistance of the operator, or, where appropriate, the operator", it would be reasonable to assume that in most cases of transboundary damage the State would have a more prominent role. That role derived from the general obligation of States to ensure that activities within their jurisdiction and control did not cause transboundary damage.

37. Draft principle 6 was entitled "International and domestic remedies". The requirement to ensure appropriate compensation procedures applied to all States. Paragraph 2 referred to international procedures, which might include mixed claims commissions, negotiations for lump sum payments, and so on. The international component did not preclude the possibility that a State of origin might disburse compensation to the affected State through a national claims procedure. The reference to procedures that were expeditious and involved minimal expenses reflected the desire not to overburden the victim with a lengthy procedure akin to judicial proceedings which might act as a disincentive. Paragraph 3 focused on domestic procedures and the equal right of access. That paragraph stressed the need to confer the necessary competence on administrative and judicial mechanisms to ensure that they were in a position to entertain claims effectively and the importance of non-discriminatory standards for the determination of claims was also emphasized. With regard to equal access to information, the latter should, where feasible, be accessible free of charge or with minimal costs.

38. Turning to draft principle 7, which dealt with the development of specific international regimes, he said that its objective was to encourage States to cooperate in the development of international agreements on a global, regional or bilateral basis in three areas: prevention, response measures and compensation and financial security. In essence, the draft principle would establish at the international level the same set of obligations contemplated in draft principles 3, 4 and 5.

39. Draft principle 8, which addressed implementation, reaffirmed what was implied in the other draft principles, namely that each State must adopt legislative, regulatory and administrative measures for the implementation of the draft principles, and emphasized the principle of non-discrimination. The reference to nationality, domicile or residence were merely examples of the basis of discrimination in the context of the settlement of claims concerning transboundary damage.

40. He drew attention to the "other decisions" contained in chapter XI of the report and observed that the Commission had decided to include two new topics that already appeared in its current programme of work, namely "Expulsion of aliens" and "Effects of armed conflicts on treaties", for which Mr. Maurice Kamto and Mr. Ian Brownlie respectively, had been appointed Special Rapporteurs. Although the Commission normally decided on the inclusion of new topics in its long-term programme of work at the end of a quinquennium, the Working Group had recommended that the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" should be included in the programme of work for the current quinquennium.

41. The Commission had been cooperating with other bodies, including the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization and the European Committee on Legal Cooperation, and had had a visit from Judge Jiuyong Shi, President of the International Court of Justice. Members of the Commission had also conducted informal exchanges of views on topics of mutual interest with members of the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the International Committee of the Red Cross and the International Law Association.

42. With regard to summary records, mentioned in paragraph 9 of General Assembly resolution 58/250 of 23 December 2003 on pattern of conferences, the Commission had concluded once again that those records were an inescapable requirement for the procedures and methods of its work. They constituted the equivalent of *travaux préparatoires* and were an indispensable part of the process of progressive development of international law and its codification.

43. The Commission attached great importance to the International Law Seminar, which was held annually in Geneva during the meetings of the Commission and enabled young lawyers, particularly those from developing countries, to familiarize themselves with the Commission's work and the activities of international organizations with headquarters in Geneva. Through its Chairman, it therefore expressed its appreciation to those Governments that had contributed to the Seminar and urged States to provide financial assistance as soon as possible.

44. He alluded to the importance of the Commission's secretariat, the Codification Division of the Office of Legal Affairs. Its competence, efficiency and valuable assistance, in respect of both the substance of the Commission's work and the procedural aspects thereof, were vital to the success of that work. Since the Division also served as the secretariat of the Sixth Committee, it was an invaluable and irreplaceable link between the two bodies and provided a high-quality service which must be preserved.

45. Lastly, he took note with appreciation of the updated Survey of Liability Regimes prepared by the Codification Division and of a thematic presentation of comments and observations received from Governments and international organizations on the topic "Responsibility of International Organizations". He recommended that they should be issued as official documents of the Commission.

46. **Mr. Lammers** (Netherlands) said his delegation attached great importance to the codification and progressive development of the rules of international law governing diplomatic protection. Consequently, the Netherlands had regularly commented on the work on the topic and the progress made. Those comments had related mainly to diplomatic protection on behalf of an injured person against a State of which that person was a national, or of stateless persons and refugees; the question of the need to exhaust local remedies; the protection of corporations and their shareholders and other legal persons, and the relationship between the draft articles and international investment protection agreements. The Netherlands was pleased that a complete set of draft articles had been adopted on first reading and would submit pertinent comments and observations, after obtaining the advice of the independent Netherlands Advisory Committee on Public International Law Issues.

47. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), the Commission and, in particular, its special rapporteurs, should be commended for the adoption, on first reading, of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The Commission had been debating the topic for more than 25 years, owing to changes in position and the divergent views of its members, but the persistence of the special rapporteurs, with help from academic writings, had culminated in a result that was conceptually well-founded in international law.

48. The Netherlands supported the main thrust of the draft principles and the thesis that international liability for transboundary harm arose also when a State had complied with its international obligations relating to an activity that had been carried out under its jurisdiction or control. The draft principles sought to fill a gap in international law by ensuring that States took all necessary measures to make prompt and adequate compensation available to victims of transboundary damage caused by hazardous activities. As for the content of such measures, it appeared to have been accepted that domestic law should consist of

a set of procedural and substantive minimum standards. While it was necessary to grant States some flexibility in that regard, discussions on that point had not been exhausted, and an effort should be made to refine the draft principles; his Government would therefore submit new comments and observations.

49. The Netherlands did not support the current, albeit provisional, approach of giving the final form of a draft convention to the work on the prevention aspects, and of draft principles to the work on the liability aspects. As a minimum, the obligation of States to take necessary measures to ensure that prompt and adequate compensation was available to victims of transboundary damage caused by hazardous activities should be incorporated into the draft articles on prevention of transboundary harm from hazardous activities. It could be supplemented by guidance in the form of general principles, but, in any case, should take the form of an international obligation to ensure that innocent victims of transboundary damage would not be deprived of compensation.

50. **Mr. Ehrenkrona** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), expressed regret that the final version of the Commission's report had only been made available to delegations on 15 September 2004; he hoped that the delay would not be repeated the following year. Regarding the various topics on the Commission's agenda, the Nordic countries appreciated the achievements with regard to diplomatic protection and responsibility of international organizations. Nevertheless, with regard to some of the other topics in the Commission's current programme, it was noticeable that once a topic had been put on the agenda, it seemed difficult to remove it, regardless of the comments of Governments during the Sixth Committee's discussions, or the utility of the outcome. It was true that the choice of topics to be included in the agenda lay with the Commission. However, regarding the appropriateness of certain current topics, it would be desirable for the Commission to take the opinions of Governments into account. For example, the Nordic countries considered that the topic "Unilateral acts of States" should be removed from the agenda and had already made a proposal to that effect, but apparently the Commission had never discussed that possibility. That problem was related to the connection between the Sixth Committee's discussions and the way in which they were reflected in the Commission's deliberations. The dialogue between Governments and the Commission should be reinforced, so that their contributions were duly taken into account by the latter. Consequently, it was important that the Secretariat should forward all statements made in the current debate to the Commission in writing.

51. The fragmentation of international law was an extremely interesting topic, of both theoretical and practical significance, and the Commission was dealing with it in an innovative way. Further results from the Working Group were awaited with interest, not only because of their substantive importance, but also because they provided a possible example of the way in which the Commission could proceed with other suitable topics in the future.

52. The Commission had decided to include two new topics in its current programme of work, namely: "Expulsion of aliens" and "Effects of armed conflicts on treaties", and had appointed special rapporteurs for both topics. Although the first topic was potentially very interesting, the exact focus of the special rapporteur's work had yet to be defined. If it was a question of preparing a study on migration law and policies, the Nordic countries were not convinced that it was a suitable topic for closer scrutiny by the Commission. The effects of armed conflicts on treaties could prove to be a more focused topic that would reflect previous calls by the Nordic countries for flexible but restrictive approaches when choosing the topics to be studied by the Commission. An outline and a first report were awaited at the Commission's next session.

53. As for the topic "Obligation to extradite or prosecute", which the Commission had decided to include in its long-term programme, despite the Nordic countries' initial reluctance, it was now possible to identify two areas of interest: the relationship between *aut dedere aut judicare* obligations and human rights obligations, and the way in which the traditional perception of the *aut dedere aut judicare* rule should be considered in the light of modern concepts of universal jurisdiction.

54. With regard to the Commission's long-term programme, the Nordic countries had been in favour of including the issue of international disaster response law as a possible topic for study, and wondered what the international community's possibilities were in the

context of the relevant international law. The Commission should focus on topics whose codification and development would contribute to the needs of the international community, using its broad competence and experience in matters of general international law. In that respect, the Nordic countries appreciated the practice of cooperation with associations of jurists involved in the codification and development of international law, and encouraged further cooperation of that nature.

55. The Commission should continue seeking ways to make its sessions as productive and efficient as possible. Consequently, it was crucial that the work of the special rapporteurs should make good progress. In that respect, the Commission's Planning Group should not only examine future topics and parts of the Commission's working routines, but also present its vision of how the Commission should function in future, since it could produce documents of immense importance to international law and order.

56. **Mr. Strømmen** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Sweden and Norway) and referring to the topic "Diplomatic protection", said they would respond to the Commission's request for comments on the draft articles before the 1 January 2006 deadline. In general, the Nordic countries was satisfied by the thrust and envisaged results of the draft articles, since, in its work, the Commission had taken into account their call for clear and unambiguous provisions that responded to the needs of practitioners. In relation to draft articles 5 and 10, and the issue of whether the rule of continuous nationality should apply not only until the time of the official presentation of the claim, but until the resolution of the dispute or the date of an award or a judgement, there were arguments in favour of the approach followed by the Commission and also of the one that required relevant links between the person or corporation and the State exercising diplomatic protection, even after the official presentation of the claim. They therefore looked forward to other States' comments on the issue and further discussions by the Commission.

57. The Nordic countries were particularly pleased that the Commission had drafted a provision on diplomatic protection in respect of stateless persons and refugees (art. 8), because such individuals could be exposed to vulnerable situations. Although it was true that the article appeared to deviate from the traditional rule that a State could only exercise diplomatic protection on behalf of its nationals, it should be noted from the commentary that the term "refugee" was not necessarily limited to the definition that appeared in the Convention relating to the Status of Refugees and its Protocol. The Nordic countries understood that a State could exercise diplomatic protection also on behalf of a foreign national, lawfully and habitually residing in that State, and who, in that State's opinion, clearly needed protection, even though not formally qualifying for refugee status.

58. The Nordic countries were pleased that, when codifying the rules on diplomatic protection of legal persons, the Commission had based its work on the rules derived from the *Barcelona Traction* case. The corresponding judgment of the International Court of Justice had struck a balance between the interests of the company and those of the shareholders and had enhanced legal clarity. They were also pleased to observe that the draft articles on diplomatic protection would not exclude the protection exercised by the flag State and vice versa, so that important protective measures established by the law of the sea would not be undermined. It would be desirable to proceed swiftly to adopt the draft articles on second reading and it was to be hoped that they would soon be adopted in the form of a convention so that legal clarity would be enhanced in that important field of law.

59. **Mr. Čížek** (Czech Republic), referring to draft articles 1, 2 and 3 on diplomatic protection, said he was gratified to note that the Commission had decided to cleave to the traditional concept of diplomatic protection, according to which the State of nationality was entitled, but not obliged, to bring, on its own behalf, an international claim arising out of an injury to one of its nationals (whether a natural or a legal person), which resulted from the internationally wrongful act of another State. His delegation was pleased that, in Part Two of the draft articles, the basic principle underpinning the draft articles on the exercise of diplomatic protection of corporations reflected the general rule which the International Court of Justice had expounded in its Judgment in the *Barcelona Traction* case, namely that the State of nationality of a corporation had the exclusive right to exercise diplomatic protection in respect of an injury sustained by the corporation as a result of an alleged internationally wrongful act of another State. It also agreed with the Commission that the rule expounded

by the International Court of Justice in the well-known *Nottebohm* case should not be interpreted as a general rule of international law applicable to all States.

60. Part Three of the draft articles, on the exhaustion of local remedies and exceptions to the rule that all domestic remedies must have been exhausted before an international claim could be brought against a State, dealt with a well-established rule of customary international law, as the International Court of Justice had stated in its Judgment in the *Interhandel* case. That rule applied not only to diplomatic protection, but also to other concepts of international law relating to the protection of natural and legal persons. Although the exhaustion of local remedies rule was indisputably part of existing international law, there were many uncertainties and no provision clearly and exhaustively specified the situations in which that rule should be applied. While his Government agreed with the exceptions to the local remedies rule listed in paragraphs (a), (c) and (d) of draft article 16, it was not convinced that it was essential to include an express clause on undue delay in proceedings, since that eventuality was covered by paragraph (a) of draft article 16. Paragraph (b) of that draft article could therefore be deleted.

61. With regard to Part Four of the draft articles, his Government had misgivings about extending the scope of the draft articles to the protection exercised by the flag State of a ship in respect of an injury suffered by a member of the ship's crew who was a national of a State other than the flag State. Since one of the requirements for the exercise of diplomatic protection was the existence of the so-called "bond of nationality" between the State exercising diplomatic protection and the person who had suffered the injury giving rise to that protection, the exercise of protection by the flag State did not fall within the scope of the draft articles. The existence of such a regime could be reflected in the commentary to draft article 17 referring to actions or procedures under international law other than diplomatic protection.

62. His Government agreed with the conclusions drawn by the Special Rapporteur in his fifth report in respect of the delegation of the right to exercise diplomatic protection and the transfer of a claim to diplomatic protection.

63. In the context of diplomatic protection, the "clean hands" doctrine, the topic which would be discussed in the Special Rapporteur's sixth report, could be invoked against a State exercising such protection solely in respect of that State's acts which were inconsistent with its obligations under international law, but not in respect of misconduct by a national of that State. Having examined the Special Rapporteur's comments on the existence and applicability of the clean hands doctrine in the context of diplomatic protection, his Government concurred with the Special Rapporteur's conclusions that there was no clear and sufficient authority which would justify the introduction of a clause on the clean hands doctrine in draft article 8.

64. **Mr. Gao Feng** (China) said that he reserved the right to make further comments in the future on the draft articles on diplomatic protection. With regard to draft article 12 on direct injury to shareholders, he agreed that, in most cases, the issue of shareholders' rights should be decided by the State's municipal law. He was not, however, of the opinion that where the company was incorporated in the wrongdoing State, there might be a case for the invocation of the general principles of company law in order to ensure that the rights of foreign shareholders were not subjected to discriminatory treatment (paragraph (4) of the commentary). A company's incorporation in the wrongdoing State did not automatically have a bearing on any discriminatory treatment which might be meted out to foreign shareholders. The mere fact that a company was incorporated in the wrongdoing State was not sufficient grounds for assuming that foreign shareholders would be subjected to discriminatory treatment. That assumption would be valid only if the municipal law of the State gave foreign shareholders unreasonably weaker rights than those granted to national shareholders. Moreover, the rules containing "the general principles of company law" had not been specified. Even if such "general principles" existed, it was unclear what role they could play in determining foreign shareholders' rights and in ensuring that they were not subjected to discriminatory treatment. Even if a corporation were incorporated in the wrongdoing State, the distinction between shareholders' rights and the corporation's rights must be drawn in accordance with the municipal law of the State as a matter of principle.

65. Draft article 16 provided for four exceptions to the local remedies rule. The instance referred to in paragraph (d) raised no problems, but it was necessary to stress that, in order to be valid, such an exception

had to be expressed. The key question was who decided if given circumstances constituted one of the three exceptions. Perhaps the commentary should discuss the matter in greater detail. In practice, it was the injured natural or legal person who would first advance the claim that it was unnecessary to exhaust local remedies to the State of nationality. The latter would consider the case and reach a decision on it. If that decision was favourable, before the party concerned exhausted local remedies and in order to protect its national, the State of nationality could exercise diplomatic protection vis-à-vis the wrongdoing State, or it could seek to establish the international responsibility of that State by recourse to international judicial bodies, and if that were done, the relevant international judicial organs would take the final decision on whether the circumstances in question warranted an exception. Plainly the State of nationality of the injured person played a major role in determining whether it was necessary to exhaust local remedies in a particular case and that decision would directly affect the possibility of bringing an international claim before exhausting such remedies. Despite the Commission's intention to set forth clear, objective exceptions in draft article 16, paragraphs (a), (b) and (c) still offered the State of nationality a wide enough margin of discretion to make it hard to prevent abuses of the exceptions.

66. His third observation related to paragraph (3) of the commentary to draft article 16, which stated that the Commission "preferred the third option which avoids the stringent language of 'obvious futility' but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective redress". In that context, the term "claimant" seemed to refer to the injured person rather than the State of nationality and the crux was therefore the entity requiring proof from the injured person that there was no need to exhaust domestic remedies. If it was the State of nationality, any exegesis in the commentary would be superfluous, since the matter would be covered by the domestic procedure of the State of nationality; if it was an international judicial body dealing with diplomatic protection, an individual had no real access to it. At the international level, the burden of proof lay with the State bringing the claim on behalf of its national and not with the latter. For that reason, it was to be hoped that the Commission would revise that part of the commentary accordingly. Paragraphs (7) and (8) of the commentary, referring to paragraph (c) of draft article 16 which laid down the third exception, provided examples in which a voluntary link was absent. It was not, however, proper to discuss such examples in the context of exceptions to the local remedies rule, because the injuries quoted in the examples could have been caused by acts not prohibited by international law rather than by internationally wrongful acts of the State. Such injuries would not therefore be susceptible of diplomatic protection, because the prerequisite for diplomatic protection was the existence of an internationally wrongful act of a State.

67. Fourthly, draft article 18, which gave all special treaty provisions precedence over the draft articles, was somewhat inconsistent with draft article 17. It was also at odds with the Commission's original intention with regard to draft article 18. Initially, the Commission had only intended, through that article, to give precedence to special treaty provisions, such as those contained in investment protection treaties, over the draft articles. Hence his Government proposed the deletion of the phrase "including those" so that draft article 18 would read "The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions concerning the settlement of disputes between corporations or shareholders of a corporation and States".

68. His fifth observation pertained to draft article 19, which had been favourably received by his Government, since it confirmed that the right of the State of nationality of crew members to exercise diplomatic protection remained unaffected. Although his delegation was not against a draft article providing for the right of the State of nationality of a ship to seek redress on behalf of foreign crew members, in the interests of the progressive development of international law, it would be advisable to see whether that principle was firmly anchored in the latter. Draft article 17 had broached the question from a general angle and it was therefore to be hoped that the Commission would consider whether a separate article on the right of the State of nationality of a ship to seek redress on behalf of foreign crew members was required.

69. Turning to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he noted that in 2001

the Commission had concluded its work on the draft articles on prevention of transboundary harm from hazardous activities and within three years it had successfully completed its first reading of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The draft articles on prevention of transboundary harm from hazardous activities served as a useful guide for States on how to prevent transboundary damage. Preventive measures alone could not, however, completely preclude the possibility of such damage occurring. For that reason, victim compensation and determination of the liability of the operator or State were important issues which the international community must resolve. The draft principles sought to regulate compensation liability and damage allocation from the perspective of general principles; its balanced provisions would contribute significantly to the resolution of issues relating to compensation for transboundary damage.

70. His Government endorsed the principle of prompt and adequate compensation for victims, which was established in the draft text. Primary liability should rest with the operator. The proposed principles were complementary, without prejudice to existing international regimes and should not have a substantial effect on States' domestic regimes.

71. His Government wished to make two comments specifically relating to the draft principles. First, it had reservations about the inclusion of damage to the environment per se in the definition of damage, because that inclusion was not adequately grounded in international law. Secondly, the strict liability regime governing transboundary damage in the draft principles was inflexible and not entirely consistent with current international practice. It should be brought into line with the approach adopted in some treaties where strict liability was combined with fault liability and the regime was applicable mutatis mutandis to specific cases.

72. Ultimately the outcome of the work on that topic could take the form of a declaration, a guiding principle or a model law which might serve as a guide for States and also as a basis for a future convention.

73. **Mr. Curia** (Argentina) said he was pleased that the Commission had adopted, on first reading, the draft articles on diplomatic protection and the draft principles under the topic "International liability for injurious consequences arising out of acts not prohibited by international law". He believed that through a second reading in 2006, work on the two topics could be completed. He also supported the proposal that the Commission should undertake two new studies in 2005: one on the effects of armed conflicts on treaties and the other on the principle *aut dedere aut judicare*.

74. He endorsed the approach taken in the draft articles on diplomatic protection because they codified customary rules for the exercise of diplomatic protection in its most traditional and classic form. It was therefore clear that the scope of the topic excluded other types of protection (such as human rights and investments) which were covered by other regulations, institutions and procedures, and it was important not to anticipate conclusions on those matters.

75. Within the framework of that traditional codification system, it was his delegation's understanding that draft article 8 on diplomatic protection in respect of stateless persons and refugees, which represented a satisfactory solution, constituted an instance of progressive development.

76. The draft articles did not address the issue of the effects of diplomatic protection, nor did it cover the application of norms concerning reparation; his delegation believed that it would be highly casuistical and of little use for the Commission to extend its study to include those issues insofar as they arose from application of the general rules concerning reparation.

77. With regard to the continuous nationality rule (draft article 5), it was important to bear in mind the date on which the claim was presented and the fact that nationality must be retained until the date of the judgement or other final settlement; to do otherwise would destroy the causal link necessary for diplomatic protection.

78. The clean hands doctrine concerning the conduct of a national did not constitute an additional condition or requirement for the exercise of diplomatic protection. The concurrent guilt of the victim of the wrongful act should be taken into account in determining the scope of the reparation.

79. His delegation was in favour of pursuing work on the draft principles on international responsibility for injurious consequences arising out of acts not prohibited by international law with a view to a general

declaration of principles by the General Assembly; it was to be hoped that that declaration would contain general rules on liability for risk and would include consideration of the allocation or assignment of losses in a manner that would address the question of liability and reparation for injury.

80. His delegation expressly supported the Commission's approach and the content of the draft principles and considered it important to establish the principle that the victims of transboundary disasters were entitled to prompt reparation and adequate compensation (recognized in principles 3 and 4).

81. Lastly, he stressed the need to establish the obligations of the States involved, especially the State of origin of the damage.

Mr. Dhakal (Nepal) (Vice-Chairman) took the Chair.

82. **Mr. Braguglia** (Italy), addressing the issue of shareholder protection, observed that in conventional practice, there was a fairly general trend towards increased protection of shareholders from harm caused to their corporations, but general international law did not appear to reflect that development. That fact might be a consequence of the difficulty of establishing the nationality of shareholders because of the ease of movement of shares. The solution adopted by the Commission was therefore understandable: shareholders were entitled to protection only in the case of an injury to a corporation which had ceased to exist or where the State in which the corporation was located had required incorporation as a precondition for doing business there. There were only a few such cases where the need for protection seemed to justify an exception to the rule.

83. The Commission's solution regarding protection of ships' crews (who often held a nationality other than that of the ship) seemed appropriate; it allowed the flag State to intervene, although not through diplomatic protection.

84. It was also useful to include in draft article 17 a reminder that the conditions established for the exercise of diplomatic protection did not preclude recourse to other actions or procedures to secure redress for injury. The means of recourse available in the areas of the defence of human rights and the protection of investments demonstrated the importance of that option. It was clear that in such cases, the State could exercise its right to protect its national but could not affect that national's enjoyment of the right to recourse.

85. With respect to the question of international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had just completed rapidly a text which constituted encouraging progress despite its scope, which was limited as it failed to address difficult issues such as that of damage caused in areas beyond a State's jurisdiction. Although the draft text contained only a few principles, it had the advantage of drawing States' attention to the need for fuller coverage of the risks inherent in hazardous activities. General application of the principles set forth by the Commission would be difficult; it would be more reasonable to apply them in respect of certain types of risk or within a group of countries in the same region. Thus, it was understandable that the Commission had elected not to prepare a draft general convention or even a mere framework convention. It was also understandable that the establishment of a few principles constituted limited progress towards a solution to the problem. Clearly, those principles needed to be adapted to the circumstances and expanded in detail.

86. **Mr. Ludbrook** (New Zealand) said that in some areas, such as the right to exercise diplomatic protection in respect of stateless persons and refugees, his delegation might have been inclined to opt for slightly different and more flexible rules to ensure that individuals were not left without effective protection. It recognized, however, that the situations which States had to face at the practical level varied greatly and that the Commission had struck a balance in that regard. The formulation of the exception to the local remedies rule represented a carefully circumscribed acknowledgement of the fact that, currently, an individual could be injured by the act of a foreign State outside or within its territory without having any real connection with that territory. In such circumstances, which were difficult to define, it might well be unreasonable or unjust to require the exhaustion of local remedies.

87. On the topic of international liability, his delegation continued to believe that the risk of transboundary harm from hazardous activities was an issue that would grow in importance with the advent of new technologies. Prevention was certainly a key to the issue, but the question of who had to carry the loss in

circumstances where, despite the application of the best-known prevention measures, loss occurred, could not be ignored. His delegation was therefore pleased that the Commission had adopted on first reading a set of draft principles on the liability aspect of the topic to complement the draft articles on prevention.

88. In his delegation's view, there were three aspects to the issue of transboundary harm arising out of hazardous activities not prohibited by international law. The first related to the development of rules or principles governing prevention of an accident. The second related to the development of rules or principles governing mitigation of or response to an accident in order to limit the harm that might result, despite the best preventive steps having been taken. The third related to the development of rules or principles governing compensation and liability in the event of an accident occurring. Those three aspects were part of a continuum since, if prevention and response were effective, issues of compensation and liability need never arise or at least would not involve such high levels of loss.

89. In general terms, his delegation could support the draft principles and accept the basic understandings articulated by the Commission in the general commentary (pages 157 to 160 of the report). However, on the question of scope, it would have liked the regime to apply to the global commons, although it accepted the Commission's advice that the issues surrounding compensation for such losses had some unique and complex features that might require separate treatment. On the question of form, his delegation acknowledged that there could be different perspectives and views and understood the factors involved.

90. Given the wide range of harm that might be suffered through an accident involving hazardous materials, it was important in a framework instrument that the definition of compensable damage should be wide enough to cover the range of situations where the causal links between the accident and the harm sustained were clear and demonstrable. The language of the proposed definition differed in some respects from that used in a number of relevant instruments, with some parts being cast in more general terms. However, that was consistent with the overarching nature of the set of principles and allowed for the development of the law in that area in accordance with those principles. Thus, it was clear that consequential economic loss might be covered under Principle 2, paragraphs (a) (i) and (ii), and pure economic loss under paragraph (a) (iii), which was broad enough to encompass loss of income deriving directly from an economic interest in any use of the environment. In New Zealand's region, two key areas of risk were related to harm caused to the fishing and tourism industries as a result of significant harm suffered by the marine environment. It was important for economic loss suffered by such industries to be compensable, provided that the link between the incident and the economic loss was clear.

91. His delegation supported the Commission's continued allocation of priority to the completion of its work on the draft principles and supported the inclusion of appropriate language in the resolution on the Commission's work. It welcomed the adoption on first reading of the draft principles and called on members to submit comments by 1 January 2006 with a view to the Commission's completion of its work on them during the current quinquennium.

92. **Ms. Ertman** (Finland), speaking on behalf of the five Nordic countries (Denmark, Iceland, Norway, Sweden and Finland), and referring to chapter VII of the Commission's report, said that the approval of the draft principles was a major achievement. The Nordic countries were content with the draft principles and were in favour of a civil liability model taking a general rather than a sectoral approach. The draft principles were pragmatic in the sense that they aimed to ensure compensation rather than to serve as an environmental policy instrument.

93. Firstly, the objective of the draft principles — to ensure compensation for victims of transboundary damage — was the right one, for the situation of the victims should be the primary focus of the liability regime. That was the starting point of Principle 22 of the 1972 Stockholm Declaration and of Principle 13 of the 1992 Rio Declaration. Secondly, the principle that liability should not require proof of fault was also correct. That had been the trend in environmental liability regimes at both the national and international levels. Moreover, that approach was in line with the scope of application, i.e. transboundary damage caused by activities not prohibited by international law. Thirdly, the Nordic countries also supported the view that damage to the environment per se was actionable and required prompt and adequate compensation. Fourthly, liability principles should be based primarily

on civil liability, and a liability regime ought consequently to impose liability on the operator; in addition, there should be appropriate financial guarantees as proposed in draft principle 4.

94. The Nordic countries favoured the title appearing in brackets, i.e. "International liability in case of loss from transboundary harm arising out of hazardous activities" or the title "Principles on the allocation of loss in case of transboundary harm arising out of hazardous activities". However, the title of the topic — "International liability for injurious consequences arising out of acts not prohibited by international law" — was not quite accurate in relation to the principles under consideration, for it gave the impression that international law did not prohibit acts causing injurious consequences and that it was legitimate to commit such acts. Rather than acts, it was activities or, more specifically, lawful but hazardous activities, which should be subject to a liability regime. That position was in line with the Commission's draft articles on responsibility of States for internationally wrongful acts.

95. The Nordic countries were not in favour of including a "significant" threshold in the scope of application or in the definition of "damage" since such a threshold was unnecessary and would be out of line with several liability regimes. The commentary to principle 2, paragraph (a), was not convincing. Firstly, although the commentary referred to the general pronouncements on future damage in the *Trail Smelter* case, it did not mention that the arbitral tribunal had awarded compensation with regard to cleared land and uncleared land without taking such a threshold into account. Secondly, the commentary stated that the *Lake Lanoux* award dealt only with serious injury. However, the point at issue had been Spain's inability to submit evidence showing any injury. Thirdly, the commentary cited in footnote 365 to the Convention on the Regulation of Antarctic Mineral Resource Activities, the Convention on Environmental Impact Assessment in a Transboundary Context, and article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses, which referred to "significant", "serious" or "substantial" damage as thresholds for legal claims. That was somewhat misleading, since the first instrument had been superseded by the Madrid Protocol and the other two examples were not concerned with liability issues. It was interesting that the commentary did not mention conventions which did not set such a threshold, for example the conventions on liability regimes relating to nuclear activities or the transport of oil by sea.

96. With regard to the concept of prompt and adequate compensation, it would be helpful for the commentary to give more guidance as to what was meant by "prompt and adequate". For instance, precedents or examples from the field of investment could shed light on the matter.

97. When it came to the possible form of the instrument, doubts arose as to the added value of concluding a framework convention. There were other possibilities, such as the adoption of the draft principles by means of a General Assembly resolution. The Commission had managed to strike the right balance in codifying principles on the allocation of loss, and it was doubtful whether that balance could be maintained if the principles were upgraded into a framework convention, which would require lengthy diplomatic negotiations. Nor was it certain that States would have sufficient incentive to ratify such a convention.

98. The draft instrument on the prevention of transboundary harm from hazardous activities should be adopted in conjunction with the draft principles on liability. The two instruments could be dealt with in a single General Assembly resolution or presented as two separate but coordinated resolutions.

99. **Mr. Buchwald** (United States of America) said that his delegation congratulated the Commission on the adoption on first reading of the draft articles on diplomatic protection, on which it would submit written observations in due course. One preliminary comment on a positive note was that the revised draft articles on the exhaustion of local remedies no longer included a provision that exhaustion should be limited to available remedies provided for in the municipal law of the respondent State, for such a provision would be inconsistent with the rule of customary international law to the effect that a litigant must exhaust all possible remedies, including those dependent on a discretional decision of the highest judicial or administrative organ. His delegation believed the change to be a positive one, all the more so because it was not satisfied with the exceptions to the local remedies rule set out in draft article 16. It was also good that the draft articles did not define the relationship between diplomatic protection and

functional protection, for the regulation of functional protection remained relatively vague and the topic fell outside the scope of the draft articles.

100. Turning to other questions which caused his delegation concern, he said that the scope of the draft articles must remain limited to the codification of customary international law and should depart from or add to the customary regime only in the presence of grounds arising from considerations of public order supported by a broad consensus among States — conditions not found in several of the draft articles approved on a provisional basis. Specifically, the treatment of the continuous nationality rule departed without justification from customary international law, which required that the injured person must be a national of the State exercising protection from the time of the injury until the date of settlement. The draft articles replaced the date of settlement of the claim by the date of its submission as the end of the time limit of the continuity requirement and left open the question whether continuity was required during the period from the occurrence of the injury to the end of the time limit, whether submission or settlement. Such departures from customary international law lacked foundation.

101. Draft article 11 on protection of shareholders was also out of line with the customary rules in that it introduced two exceptions not found therein. Unless agreed otherwise, a State could exercise diplomatic protection on behalf of shareholders only when they had suffered direct losses which had not been made good. The Commission should harmonize the articles in question with the customary international law in force.

The meeting rose at 12.35 p.m.

United Nations

A/C.6/59/SR.18

General Assembly

Fifty-ninth session

Official Records

Distr.: General
8 December 2004
English
Original: Spanish

Sixth Committee

Summary record of the 18th meeting

Held at Headquarters, New York, on Tuesday, 2 November 2004, at 10 a.m.

Chairman: Mr. Bennouna .... (Morocco)

later: Mr. Dhakal (Vice-Chairman) .... (Nepal)

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04-58458 (E)

The meeting was called to order at 9.40 a.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Ms. Swords** (Canada), referring to the draft articles on diplomatic protection, said that the progressive development of international law contemplated in draft article 8 reflected a real need arising from the interplay of statelessness, refugee status and rules relating to the acquisition of nationality. In the initial overall review of the draft articles Canada had noticed, in terms of their scope, a fairly fundamental ambiguity which needed to be resolved as it went to the very meaning of diplomatic protection and hence had an impact on the approach taken throughout the draft articles. The definition of diplomatic protection in draft article 1 appeared to be limited to cases where a State adopted in its own right the cause of its national. That would exclude some of the consular functions in the Vienna Conventions. However, in the internal discussions conducted on the draft articles, based on examples in the commentaries on specific draft articles, it had become apparent that, for some, the scope of coverage of the draft articles included consular functions as covered by the Vienna Conventions. If the intent of the draft articles was to apply to assistance to nationals as defined in the Vienna Conventions, the approach to nationality would become particularly relevant to certain obligations in those Conventions. The Vienna Convention on Consular Relations, in particular, created specific obligations between States concerning the treatment of foreign nationals. A case in point was the obligation in article 36 of the Convention on Consular Relations to notify detained foreign nationals of the right to contact their consular post. Canada attached considerable importance to that obligation, which deserved to be the subject of a common understanding among States.

2. Predominant nationality was the approach taken in draft article 7 in respect of multiple nationality and claim against a State of nationality. Within the context of the Vienna Convention on Consular Relations, the consular functions of a discretionary nature listed in article 5 of the Convention were triggered by nationality, but so were obligations such as those in article 36 to notify detained persons of certain rights. She wondered whether the Commission intended that the approach to predominant nationality stated in article 7 should be applied to situations where a treaty obligation was triggered by foreign nationality. Canada sought to provide consular assistance to Canadian citizens regardless of any other nationality they might possess, but it was aware that many States did not feel obliged under international law to provide consular access to their own nationals, even if they also held another nationality. The draft articles could become important and influential tools for all to use. It was therefore all the more important to clarify their intended impact on existing policies of broad consular support and on treaty obligations that were triggered by nationality.

3. **Mr. Läufer** (Germany), referring to the topic of diplomatic protection, said that Germany once again fully subscribed to the legal position currently expressed in draft article 2, which stated that under international law the exercise of diplomatic protection constituted a right, but not a duty, of States. At the national level, even if for reasons of constitutional law the State was under an obligation to exercise diplomatic protection, it still had a large margin of discretion as to how to comply with that obligation, as upheld recently by the Federal Constitutional Court of Germany. At the international level, the concept of diplomatic protection had to be distinguished from other concepts of law which dealt with the protection of individuals and, in particular, from the regime of human rights which imposed clear obligations on States. On the whole, Germany agreed with the rules adopted by the Commission for the diplomatic protection of legal persons. The Commission gave priority to the rights of the State of nationality of the corporation, but when it came to the protection of shareholders, the rights of the State of nationality of those persons were normally not taken into account. The State of nationality of the shareholders might exercise its right to diplomatic protection only in situations where the corporation had ceased to exist for reasons unrelated to the injury, or where the injury had been caused by the State of nationality of the corporation. Germany, however, still believed that the exceptions currently embodied in article 11 might be too rigid and might not adequately take into consideration situations where, for reasons of equity, the State of nationality of the shareholders should exercise the right of protection. That notwithstanding, Germany accepted the Commission's overall objective, which was to avoid situations of overlapping claims, as

had been the reasoning of the International Court of Justice in the *Barcelona Traction* case.

4. Regarding the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had taken an important step in the further development of standards in a field of international law that, in an age of globalization and the advancing spread of technology, was not only full of opportunities for mankind, but also rife with new risks. In particular, environmental damage of massive transboundary dimensions was an increasingly observed phenomenon which raised difficult legal issues, especially with regard to liability. The Commission had chosen an interesting approach which found a third way between pure State liability and liability between private parties governed by international law. That third way envisaged States entering into obligations under international law to open up avenues under civil law for liability and compensation claims, an approach which seemed to be set out in Principle 4 of the Commission's report. Germany, however, had its doubts as to whether that would be a workable compromise between the existing approaches. While it would bring greater flexibility and allow the individual contracting parties to take into account the special features of various risks, that advantage would be cancelled out by two disadvantages, namely: the creation of liability conventions which, in contrast to the current ones, would not be self-executing, thus reducing their enforceability. Moreover, the end result of greater flexibility was reduced legal certainty, which could lead to additional costs, particularly in fields of economic relevance. On the whole, notwithstanding all the difficulties inherent in the current approaches, Germany felt that agreements that created direct liability claims under civil law were preferable, an approach reflected in article 4, alternative B, as originally proposed by the Special Rapporteur. That approach would be more in line with the "polluter pays" principle.

5. Germany was also of the opinion that the time was not yet ripe for a binding general convention on liability since the types of transboundary environmental risks to be covered were still too heterogeneous. Some kind of framework convention (model law) and a high-level reference document which extracted commonalities from existing treaties and carefully developed them would be more helpful for the future development of international law in that area. To that extent, he welcomed the principles elaborated by the Commission. In Germany's view, a future model law should contain the following core elements: prompt response measures to prevent loss or damage caused by an environmental incident; adequate financial security, achieved in particular by insurance obligations and/or the establishment of a fund; and the creation of effective judicial protection, particularly in transboundary cases. All those elements seemed to be reflected in Principles 5 to 7 and would be critical to the achievement of the overall goal of providing victims of transboundary environmental damage with prompt and adequate compensation.

6. **Mr. Romero** (Brazil) noted with satisfaction that diplomatic protection, as defined in draft article 1, only arose within a context of peaceful settlement of disputes between States and never, except as provided for in Article 51 of the Charter of the United Nations, through recourse to the threat or use of force. By definition, diplomatic protection pertained to States that exercised it at their discretion and not at the behest of individuals, as set out in draft article 2. For that reason, it was not to be confused with human rights issues, even though in certain circumstances it might be exercised under conditions that involved the protection of human rights. As concerned the protection of crews at sea, he recalled that the United Nations Convention on the Law of the Sea provided the framework for addressing issues relating to prompt release and compensation. Brazil recognized, however, that the approach based on the flag State or State of registration enshrined in that Convention did not address some issues that might be usefully explored in the context of diplomatic protection. Brazil welcomed the proposals on the exhaustion of local remedies, which accorded with central tenets of customary law on diplomatic protection, and considered that the notion of reasonable possibility provided a useful framework for developing that concept. Proposals to widen possible exceptions, however, must only be considered on the basis of precise criteria applicable to specific circumstances. Proposals involving implicit waiver, in particular, should not give rise to the possibility of excusing interventions against the domestic jurisdiction of the State where the foreigner was located. Brazil agreed with those who believed that the Calvo clause involved complex issues that would require further consideration by the Commission.

7. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, Brazil believed that codification in what was still a new field of international customary law was required and, for that reason, specific rules on liability and reparation would be needed. Brazil agreed with other delegations that the operator, having direct control over operations, should bear primary responsibility in any procedure to deal with losses, as provided for in the "polluter pays" principle. Obviously, that regime must strike a fair balance between the rights and obligations of operator, beneficiary and victim.

8. Mr. Deo (India) said that a State's obligation and entitlement to protect its subjects when they were injured by acts contrary to international law committed by another State from which they had not been able to obtain satisfaction through normal channels in that State constituted an elementary principle of international law, to be exercised with discretion, as each State was free to accept or refuse to exercise diplomatic protection as it saw fit.

9. Diplomatic protection should serve the interests of nationals as far as possible, and the concerns of the individuals involved should not be stretched beyond the point where it became obligatory for the State of nationality to espouse their claims, ignoring its own political or other sensitivities. Extending diplomatic protection to stateless persons and refugees as proposed in draft article 8 was undesirable because such an extension would be susceptible to wider interpretation by the State of habitual residence of the stateless person; the phrase "lawfully and habitually resident" appearing in draft article 8, paragraph 1, referred only to the national law and not to an international standard. Article 8, paragraph 2, which entitled a State to exercise diplomatic protection in respect of a person recognized as a refugee also raised concerns, departing as it did from the traditional rule that only nationals might benefit from the exercise of diplomatic protection. In addition to that, the term "refugee" in paragraph 2 was not limited to its definition in the 1951 Convention relating to the Status of Refugees. According to the commentary, the term was intended to cover refugees recognized by certain regional instruments as well. His delegation had difficulty in accepting any definition of refugee which deviated from the universally accepted definition.

10. The report of the Special Rapporteur on allocation of loss in case of transboundary harm arising out of hazardous activities provided an in-depth analysis of the need to protect the interests of innocent victims. India was of the view that the scope of the topic and the triggering mechanism should be the same as in the case of prevention of transboundary harm. In a scheme covering either liability or a scheme of allocation of loss, the primary responsibility should be that of the operator, as that person was in command and control of the activity and was duty-bound to redress the harm caused. The draft had achieved a significant breakthrough by suggesting a scheme which was not only general, but also flexible, without any prejudice to the claims that might arise and the applicable law and procedures. That flexibility was further strengthened by the focus on principles rather than on rules, but some of the draft principles had gained only sectoral acceptance, and had not found acceptance in general State practice. India was concerned about the enlarged scope of the draft text which sought to incorporate some elements in the definition of damage, such as Principle 2, which defined the term "damage" as including significant loss caused to the environment, and Principle 2 (a) (iii), which referred to loss or damage by impairment of the environment. The commentaries on the draft principles indicated that transboundary damage caused to the environment per se could be the subject matter of compensation. That idea was not supported by sufficient State practice from which general principles could be derived. Moreover, the environmental losses referred to in Principle 2 (a) (iii) could not easily be quantified in monetary terms, besides causing difficulties in establishing locus standi. For all those reasons, that element of damage needed a suitable modification.

11. In several international multilateral legal instruments, the application of environmental protection standards different from those accepted by developed countries in matters of environmental protection had been allowed as a way of promoting the right to development as an element of sustainable development. The general commentaries on the draft principles underscored the importance of that view, acknowledging as they did that the choices and approaches for the draft principles and their implementation might be influenced by the different stages of economic development of the countries concerned. India, therefore, welcomed the draft

principles and hoped that the provisions that were detrimental to the interests of developing countries would be properly considered in the Commission with a view to paving the way for wider acceptance of the draft.

12. Mr. Akiba (Japan) said that the restrained approach adopted by the Commission with regard to the draft articles on diplomatic protection was the right one, since it did not expand the scope of the draft. For example, it was correct not to include the subject of functional protection provided by international organizations.

13. When discussing the issue of diplomatic protection, it was important to be mindful of the overlap in scope with other areas of international law. For example, the treatment of foreign individuals was now covered in a more extensive and comprehensive manner through international human rights law. It could also be pointed out that rights concerning foreign investments could be better protected by a variety of arbitration clauses in investment treaties, as private parties were entitled to seek remedies directly from the recipient State of their investment.

14. That was a recent trend in international law, however, and should not be confused with the rules concerning diplomatic protection. With regard to the protection of foreign investments, for example, two processes — the invocation of diplomatic protection and arbitration under bilateral agreements — required a clear line of demarcation, although they both appeared to protect the same interests of the party concerned. While it was true that some agreements between States ensured that diplomatic protection could not be invoked when investment arbitration based on such an agreement was triggered, it was nevertheless useful to include in the articles on diplomatic protection a clause to clarify the relationships among the various approaches which seemed to protect the interests of both natural and legal persons.

15. In that connection, with regard to the previous article 21 on *lex specialis*, there remained a possibility that it would categorically and completely preclude any possibility for a State to apply the draft articles to diplomatic protection. The proposed new language for article 18 on special treaty provisions had been carefully drafted using much more general terms and bearing in mind such concerns, which was a considerable improvement.

16. Japan also hoped that, on second reading, the members of the Commission would maintain their prudent and restrained approach and not become too ambitious in expanding the scope of their discussion. The Commission had a long and positive history of contributing to the codification and progressive development of international law. It was true that international law might require aggressive and drastic change in order to respond to the contemporary concerns of international society, but it was too ambitious to expect that the codification of the draft articles on diplomatic protection would reflect a major development in international law.

17. The issue of international liability covered an extremely wide range of areas and had major implications for international law in several fields, such as maritime transport of hazardous materials, space exploration and various industrial activities. There were numerous conventions and arrangements for such activities, covering both States and operators, and the task assigned to the Special Rapporteur was enormous in that it necessitated the identification of some common elements among all those diverse areas. Against that background, Japan believed that the Special Rapporteur had taken the right path in choosing to first point out some general principles, rather than attempting to create a detailed and comprehensive structure through the drafting of specific articles.

18. It had been foreseen from the beginning of the current quinquennium that the discussion on that topic would encounter many challenges. Given the very diverse nature of the issues that might be covered, some concerns had been expressed as to whether it would be possible to present an overall structure on the matter. In that regard, the Commission had been wise to rely on its own recent work on the draft articles on prevention of transboundary harm. It had also been appropriate for the Commission to put considerable emphasis on the primary responsibility of operators. The drafted principles might require further clarification and improvements in such areas as the definition of terms and how to guarantee prompt and adequate compensation. However, the role of States should not be given too much emphasis in that regard, as most of the activities being considered were conducted by private operators. Articles placing undue emphasis on the responsibility of States in the aftermath of an incident resulting in damages were

likely to be both unnecessary and an inaccurate reflection of the current reality of international law.

19. In their current form, the draft principles were still very general. At the same time, given their broad scope, there was some doubt as to how much more specific and detailed the drafting could be. At such an early stage, Japan did not have any specific preference for the structure of the principles or articles to be produced by the work, or for the final outcome. It was to be hoped that after the discussion in the Commission on second reading, there would be a growing sense of what shape the final outcome should take, whether a set of principles for guidelines or more detailed articles suitable for further development into a convention.

20. **Mr. Dolatyar** (Islamic Republic of Iran) said that draft article 2 clearly reflected customary rules of international law and was in line with international jurisprudence. A State might have an obligation under its own domestic law to extend diplomatic protection to a legal or natural person of its nationality, but in international law there was no such obligation upon States.

21. At the international level, when a State asserted diplomatic protection on behalf of a national, it was in fact protecting its own, rather than the national's, right; that argument was consistent with the fundamental principle of diplomatic protection, that an injury to a national was an injury to the State of nationality. Domestic law thus served as an auxiliary apparatus for States to decide in which cases they were willing to exercise diplomatic protection.

22. In draft article 4, the Commission had eloquently stated the right of States to determine who their nationals were. However, as the article stipulated, and as the Commission pointed out in paragraph 6 of its commentary, the acquisition of nationality must not be inconsistent with international law. The Islamic Republic of Iran believed that States should avoid adopting laws which increased the risk of dual nationality, multiple nationality or statelessness. Neither the acquisition nor the granting of citizenship should be inconsistent with international law.

23. With regard to draft article 5, paragraph 2, on the exercise of diplomatic protection by a State in respect of the person who was its national at the date of the official presentation of the claim but was not its national at the time of the injury, the Commission had not referred to any State practice in its report. The Islamic Republic of Iran did not share the Commission's view that the current language of article 5, paragraph 2, properly addressed the concern regarding "nationality shopping" expressed by some members of the Commission. The language of that paragraph needed to be revised in order to clearly limit the exception to the continuous nationality rule to cases of involuntary loss or imposition of nationality.

24. With regard to draft article 7, the determination of predominant nationality was a subjective question. In practice, any State whose nationality was invoked by a person with dual or multiple nationality might claim that its nationality was predominant, since there were no established criteria in international law to determine the predominance of one nationality over any other. The Commission suggested, in paragraph 6 of its commentary, a range of factors to be taken into account in determining the predominant nationality. The list included factors such as curricula and the language of education, or bank accounts, which in his delegation's view could never be considered as valid factors for deciding which nationality was predominant. In an era of globalization, there were millions of individuals who were born and grew up in one country, were educated in another and worked or lived in yet another. Prevailing criteria were needed. A State whose nationality was used by an individual in order to acquire or possess property or whose passport that individual used in order to enter the country without a visa might legitimately claim that its nationality predominated over the nationality of the State where the individual was habitually resident or had been educated.

25. In the commentary on draft article 7, the Commission had relied heavily upon decisions of the Italian-United States Conciliation Commission and awards of the Iran-United States Claims Tribunal. The Islamic Republic of Iran saw those decisions and awards as *lex specialis* rather than as the general practice of States or an expression of customary international law. It considered that draft article 7 did not reflect customary international law and might give rise to new controversies between States with citizens of dual nationality. Moreover, the Commission had pointed out that draft article 7 was framed in negative language to show that the circumstances it envisaged were to be regarded as exceptional. In his delegation's view, the negative language was not sufficient for the purpose: the Commission's intention was to confine the

paragraph to exceptional cases, but in reality cases of dual or multiple nationality were not exceptional.

26. The Islamic Republic of Iran believed that draft article 13 went beyond the permissible limits of progressive development of international law. As to exceptions to the local remedies rule, his delegation had concerns over the broad and ambiguous formulation of exceptions in draft article 16, which had the potential to jeopardize the rule and make it redundant in most cases. With regard to paragraph 4 of the commentary on draft article 16, the Islamic Republic of Iran shared the Commission's view that it was for the competent international tribunal to determine the admissibility of a claim of exception to the local remedies rule and would prefer to see that point duly reflected in the text of the draft article.

27. Lastly, his delegation noted that the Commission had decided to consider the relationship between the clean hands doctrine and diplomatic protection. It believed that the question deserved further study and welcomed the Commission's decision to return to the question at its next session. In the view of his delegation, the State of nationality could not be deprived of its right to exercise diplomatic protection when the charges against its national were unrelated to the claim for which it was seeking diplomatic protection.

28. **Sir Michael Wood** (United Kingdom) said that, as the Commission had noted, the draft articles on diplomatic protection were closely connected to those on State responsibility, and must be read in the context of those articles. The Commission had been wise to adopt that approach, and to maintain the focus of the draft articles on admissibility of claims issues — in other words, nationality and local remedies. As the report stated, those articles gave content to article 44 of the draft articles on State responsibility. The Commission had likewise been right to reject the proposition, explicitly made *de lege ferenda*, that the State should have a duty at the level of international law to exercise diplomatic protection. He noted with satisfaction that draft article 2 referred to the right to exercise diplomatic protection, not to any obligation or duty to do so.

29. Rules on the nationality of claims were set forth in Part Two. In large measure they conformed to existing State practice and did not call for special comment, but certain innovations had been suggested, and must be looked at carefully between the first and second reading to see whether they really made sense in terms of both principle and practicality.

30. For example, with regard to the nationality of natural persons, he wished to mention the introduction in article 4 and article 5, paragraph 2, of the words "not inconsistent with international law" in connection with the acquisition of nationality; the words "for a reason unrelated to the bringing of the claim" in article 5, paragraph 2, which might need to be refined further; the concept of "predominant" nationality in article 7, which also needed to be examined, as the representative of India had pointed out; and article 8 on stateless persons and refugees (including the meaning of the term "refugee").

31. The nationality rules for legal persons raised more difficult issues which required further careful study. He wondered, for example, whether it was practical to allocate the right of protection of a defunct company to the State of nationality of the company rather than the State or States of the shareholders and whether the former had any real interest in taking action if the shareholders came from another State; why it should not be possible to make a claim if a company had ceased to exist for a reason unrelated to the injury, as the shareholders had still suffered; and why the right to protect shareholders against the State of nationality of a company should be limited to the case where the company was required to incorporate in the State concerned in order to carry on business there. The Chairman of the Commission had described those proposals of the Commission as a balance, but the balance did not appear quite right.

32. Draft article 13, dealing with other legal persons, might also usefully refer to articles 11 and 12 as well as articles 9 and 10, since such other legal persons might be persons comparable to shareholders.

33. The draft articles on local remedies contained in Part Three seemed broadly to have been drafted along the right lines, although further clarification might be needed. On the "clean hands" doctrine, he agreed with the Special Rapporteur's conclusion that there was no reason to include such a provision in the draft articles.

34. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), the set of draft principles — as

the representative of India had pointed out — was very general and had a very wide scope; for example, they referred to a "significant" threshold in draft principles 1 and 2 and to very broad definitions of "damage" and "environment" in draft principle 2. The primary aim should be to elaborate a set of general principles which could be drawn upon as appropriate when new agreements or domestic legislation were under consideration. The project did not seem to be one of codification or even progressive development in the traditional sense. It would be helpful if the Commission could clarify what it saw as the status of the various elements of the draft. For the reasons given, the United Kingdom strongly supported the current approach of the Commission, i.e., a set of principles to be adopted in a non-binding form.

35. With regard to substance, more thought must be given to the relationship between the draft principles and the draft articles on State responsibility. For example, the commentary on draft principle 1 suggested that liability under those principles might arise concurrently with State responsibility, but would then be an additional basis for claims. Guidance on how duplication of claims or recovery could be avoided in such circumstances would be welcome. The notion of the State as victim in draft principle 3 again raised the question of the relationship with the draft articles on State responsibility. The preamble might be one place to deal with that relationship. More generally, with reference to draft principle 7, it might be desirable to include also a more explicit *lex specialis* clause along the lines of article 55 of the draft articles on State responsibility.

36. His delegation would have expected to see more prominence given, in the preamble and in draft principle 4, to the "polluter pays" principle. Draft principle 4 must be carefully studied, particularly the application of no-fault liability under paragraph 2. In existing environmental agreements strict liability seemed to be limited to certain hazardous activities and then was subject to limited liability and other special procedures. To impose strict liability in respect of all "significant" damage seemed very sweeping. In addition, the hint of residual State liability under paragraph 5 was problematic.

37. **Mr. Lavalle** (Guatemala), referring to the topic of diplomatic protection and to paragraph 7 of the commentary on draft article 1, said that the rules of diplomatic protection clearly should not apply if a State in whose territory a diplomatic or consular agent exercised their duties failed to comply with its obligations towards those persons or their property or their privileges and immunities under the relevant articles of the Vienna Conventions on Diplomatic and Consular Relations. However, he believed that diplomatic protection should apply to injuries which that State might cause to such persons outside the exercise of their duties and outside the scope of the articles in question. As an example, diplomatic protection would apply to the seizure without compensation of the personal property of a diplomatic agent in the country in which he or she was accredited.

38. In the case of draft article 5, an exception should be made to the rule of continuous nationality if, within the period described in paragraph 1 of that article, a stateless person or a refugee protected under draft article 8 acquired the nationality of the State exercising protection.

39. With regard to the conditions established in article 9 for determining the nationality of a corporation he considered that, in line with some of the ideas expressed in paragraph 85 of the report, there was room for a condition stipulating a genuine link or relationship and one stipulating the place in which the corporation's principal economic activities were carried out.

40. The term *corporation* used in Anglo-American law applied to more than what was known in Spanish as a *sociedad anónima* and in French as a *société anonyme*; the latter term appeared in the authentic French text of the Judgment of the International Court of Justice in the *Barcelona Traction* case and corresponded to what the English version of the Judgment termed a *limited company whose capital is represented by shares*. He recommended that the terms *société* and *sociedad* in draft articles 9 to 12 should be replaced by the terms *société anonyme* and *sociedad anónima*, respectively.

41. In civil law systems, there was an intermediate form of commercial company between a limited company (*sociedad anónima*), which was characterized by having its capital represented by shares which restricted the shareholders' liability and were freely transferable, and a partnership (*sociedad de personas*), in which shareholders bore full responsibility for debts and could not transfer their shares of the capital. That intermediate commercial company was the limited

liability company, which fell within the scope of draft article 13 and, as a consequence, was covered where appropriate by draft articles 9 and 10, but not by draft articles 11 and 12, which were not referred to in draft article 13. However, draft articles 11 and 12 should apply to limited liability companies and their shareholders. The reference in draft article 13 to "9 and 10" should therefore be replaced by "9 to 12 inclusive", and paragraph 4 (of the commentary on draft article 13) should refer specifically to limited liability companies. That would make it clear that, for the purposes of draft articles 11 and 12, shareholders in a limited liability company were equivalent to shareholders in a limited company.

42. The principle that a State must expressly waive its rights was well established in customary international law. However, the comments on draft article 16 were not very clear on the application of that principle to the exhaustion of local remedies, perhaps because the principle had only one exception, as set forth in the last two sentences of paragraph 16.

43. **Mr. Abraham** (France) reiterated his delegation's concern about the late distribution of the report in the six official languages, which meant that there had been insufficient time to study and reflect on its content; he therefore invited the Commission and its secretariat to try very hard to find some means of redressing the situation.

44. The evolution of the Commission's programme of work gave rise to concern, for it contained five topics on which unequal progress had been made, although the Commission might have been expected to achieve significant advances in the 10 weeks of its annual session. If a decision was taken to expand the programme, it would be necessary to establish priorities, especially in the light of the Commission's proposed future work on the topics in question; the Commission should in fact give emphasis to those topics which might lead to some form of codification or the adoption of useful guidelines for the interpretation of the conduct of States. For example, the value of the topic of fragmentation of international law was primarily academic, and even some of the members of the Study Group had expressed doubts about the possibility of undertaking normative work in that area. In contrast, the Commission's work on the topic of unilateral acts of States might prove very useful, provided that the Special Rapporteur followed the recommendations of the Commission and its Working Group scrupulously. To date, the descriptive list of unilateral declarations of various sources and types was insufficient as the basis for an authentic repertory of practice that could underlie the codification of the law relating to unilateral acts; as the Working Group had suggested, it would be more useful to construct an analytical framework to facilitate the work of synthesis.

45. As to the topic of diplomatic protection, the Commission should focus on improving the text and supplementing it in various respects, including, for example, the effects of diplomatic protection. His delegation would address its comments primarily to the draft articles on protection of corporations and their shareholders. In draft article 9 the Commission had opted for the double criterion of place of incorporation and location of the registered office in determining a corporation's State of nationality. That solution was more prudent than an alternative formula, but the situation with regard to the protection of a corporation having its registered office in a State other than the State of incorporation remained unclear.

46. Draft article 11 (Protection of shareholders) gave rise to an even more serious problem, for its basic premise was disputable: it evoked the possibility of determining the State of nationality of the shareholders, thus allowing the exercise of diplomatic protection on an exceptional basis when injury was caused to the corporation. That conflicted with the reality of international economic relations and might generate a multiplicity of converging claims against the State presumed to have caused the injury. By casting the draft article as a negative provision, the Commission had sought to underline the fact that the State of nationality of the shareholders could exercise diplomatic protection on an exceptional basis only in the two situations that had been recognized by the International Court of Justice in 1970 in the *Barcelona Traction* case; the Court, however, had not given an opinion on the conditions constituting those exceptional situations. His delegation did not consider the condition set out in paragraph (a) of draft article 11 to be acceptable, for it would create a very broad scope for entitlement to protection by the State of nationality of the shareholders; nor could it accept the second "exception" envisaged in paragraph (b), for it would disrupt the balance between the advantages to the shareholders of owning stock in a company incorporated in a foreign State and the risk which they

assumed by accepting that the company had the nationality of that State.

47. Lastly, draft article 13 sought to determine whether it was permissible for legal persons other than corporations to invoke diplomatic protection. Given the scant practice in that area, it was impossible to assert that the regime of diplomatic protection of all legal persons should be the same as the regime applicable to corporations. It would be wiser in the end to adopt a "without prejudice" clause.

48. **Ms. Bole** (Slovenia) said that her country strongly supported the development of international law in the area of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) and welcomed the resumption of the Commission's work on international liability. In his report the Special Rapporteur had analysed correctly the observations of States on the main issues concerning allocation of loss in case of transboundary harm arising out of hazardous activities and had drawn conclusions in the light of those observations.

49. As in the case of the work on prevention, the final version of the draft principles should take the form of draft articles, for that approach laid the foundations for a binding legal text. It would also facilitate the development of more detailed and specific regimes in international agreements concluded on a regional and bilateral basis, and would ensure the adoption of prompt remedial measures, including compensation for activities which risked causing significant transboundary harm.

50. With regard to the relationship between international and national liability regimes, it was acknowledged that substantive national law applicable to compensation claims involved in most cases civil or even criminal liability. The proposed scheme was general and flexible enough and would operate without prejudice to such claims and the applicable law.

51. Draft principle 4, which provided for prompt and adequate compensation and imposed the primary liability on the operator, was in keeping with the principles of the Rio Declaration on Environment and Development and other practice which applied the "polluter pays" principle. It also reflected the important function of the State in establishing the conditions for imposing liability on the operator.

52. **Mr. Winkler** (Austria) said that his preliminary remarks would focus on draft articles 17 and 18, on diplomatic protection. The two articles dealt with separate issues. One related to actions or procedures for the protection of human rights and the other to dispute settlement procedures provided for in bilateral or multilateral investment treaties. For the sake of clarity the Commission should keep those two issues apart and not merge them into a single provision, for they used different drafting techniques: draft article 17 was a "without prejudice" clause, whereas draft article 18 was an "exclusion" clause. The broad language of draft article 17 raised problems, for it was not restricted to redress for indirect injury but also included the measures envisaged under the regime of State responsibility for redressing direct injuries, including resort to countermeasures. However, the commentary clearly reduced the scope of the provision to procedures for obtaining compensation for injuries suffered by individuals. The text even implied that a State might exercise diplomatic protection even when an individual had already instituted proceedings before a human rights court. The State causing the injury would have to accept multiple claims entered both by the State exercising diplomatic protection and by the individual instituting human rights proceedings. However, diplomatic protection and other "actions or procedures" to seek redress were not entirely independent of each other: in accordance with article 53 of the draft articles on State responsibility, countermeasures were excluded if redress proceedings had been instituted. That applied equally to redress proceedings instituted by individuals.

53. Draft article 18 raised other questions because it used a different drafting technique than article 17; since no reason was given for such a distinction, would it not be possible to reformulate draft article 18 as a simple "without prejudice" clause? And what was meant by "inconsistent with special treaty provisions"? Did the phrase mean that that the treaty specifically excluded resort to the exercise of diplomatic protection or that it would suffice if protection was incompatible with the object and purpose of the treaty?

54. The gist of the draft principles on international liability was that victims of transboundary environmental damage should obtain compensation; consequently, the main elements were the duty to pay compensation, and the necessary instruments, mechanisms or procedures to guarantee such

compensation. The true issue was not the allocation of loss but the allocation of the duty to compensate.

55. In the case of environmental damage, the main difficulty was to prove a causal relationship between the damage and an activity. Draft principle 4 was useful in that it did not require proof of fault. Although the provision established the duty of compensation for damage, without proof of fault or strict liability it did not fully achieve the objective of reducing the victim's burden of proof, for what was needed was a lessening of the victim's duty to prove causation. In order to achieve that objective the burden of proof was usually shifted in such a way that a high probability was sufficient to prove causation. The current practice of strict liability schemes provided for very few exceptions, i.e., in the event of war, natural disasters, etc. But it was difficult to derive such exceptions from draft principle 4 in combination with draft principle 3. Such exceptions should be identified in order to establish the framework for compensation, for otherwise the text might be read as not permitting any exceptions. With regard to the financing of compensation, recent practice had developed a three-tiered approach with three different sources of financing: the polluter, a collective fund, or the State, although the last possibility was limited to exceptional cases, such as nuclear pollution. However, a restriction on ultra-hazardous activities could be justified insofar as the State authorizing them should also assume the resulting risk.

56. Draft principle 5 fell outside the main thrust of the draft principles and should be restricted to the requirement of notification.

57. Draft principle 6 established a duty to provide adequate mechanisms at the national and international levels. However, it remained unclear who would be entitled to claim compensation in cases of damage to the environment. Would non-governmental organizations, for example, be entitled to do so? And would States be entitled to present claims at a State-to-State level or would they, like individuals, be subject to proceedings? It would also be useful to combine draft principle 6, paragraph 2, on international claims settlement procedures, with draft principle 7, on specific international regimes.

58. Lastly, it would be most appropriate to include a provision on dispute settlement, for the main objective of the draft principles was to provide guidance for States in the settlement of disputes related to environmental damage. The draft principles did not lend themselves to becoming a self-executing treaty; they should merely establish some basic rules or guidelines for States that might evolve into legally binding rules following further elaboration.

59. *Mr. Dhakal (Nepal) took the Chair.*

60. Mr. González Campos (Spain) said that, generally speaking, the overall thrust of the draft articles on diplomatic protection was appropriate, although certain points of the draft articles and the commentaries still needed to be amended. The language of draft article 1 was not satisfactory because it did not define the basic elements of the subject matter; rather, the definition focused on measures that a State could take for the exercise of diplomatic protection, which gave rise to two adverse consequences. First, there was a reference to the procedures for the settlement of international disputes under Article 33 of the Charter of the United Nations and various General Assembly resolutions, as noted in paragraph 5 of the commentary. The reference to "diplomatic action" covered any procedures employed by a State "to inform another State of its views and concerns", a phrase which was unfortunate, since international practice showed that diplomatic protection consisted mainly of a State bringing a claim against another State concerning certain injuries to its nationals in order to compel that other State to abide by international law. Therefore, it was irrelevant, for the purposes of the definition, that the claim should be accompanied by a protest — although that was often the case — containing a request for an investigation into the facts or a proposal for other means of peaceful settlement. What was really relevant was that the State bringing such a claim espoused the cause of its nationals and stated as much. Second, as a result of the foregoing, the current language of draft article 1 did not distinguish between "diplomatic protection" proper and other related concepts, such as diplomatic or consular assistance to nationals experiencing difficulties as a result of their detention or trial in another State, a situation where none of the criteria for diplomatic protection proper, such as the exhaustion of local remedies, could be invoked. That distinction was acknowledged by the Special Rapporteur in his fifth report when, in reference to article 8 C of the Treaty on European Union, he noted that it was not clear whether that provision contemplated diplomatic protection as

understood in the current draft articles or only referred to immediate assistance to a national in distress. That distinction was not only a reality in daily practice but had been reflected in all recent decisions of the International Court of Justice, such as the *LaGrand* case and the *Avena and Other Mexican Nationals* case, where the Court had found that a State had obligations incumbent upon it under an international convention to render consular assistance without prejudice to the State of nationality being able to exercise diplomatic protection later. From the two examples mentioned, it appeared that draft article 1 would require a more precise definition of diplomatic protection. To that end, he suggested the following wording for draft article 1: "Diplomatic protection consists of formal action through which a State adopts in its own right ..."; the rest of the paragraph would be the same as in the draft. That wording would underscore the fact that the essence of diplomatic protection was the communication through which the State of nationality made a claim for international law, in the person of its nationals, to be respected, thus distinguishing such protection from "diplomatic or consular assistance" to nationals abroad.

61. The commentary on draft article 3, which established the basic rule that only the State of nationality was entitled to exercise diplomatic protection, except as provided in paragraph 2 which referred to draft article 8, under which diplomatic protection might be exercised in respect of stateless persons and refugees habitually resident in a State, was very brief. It was not consistent with the importance of the rule that the article established. For that reason, it should be expanded to include specific references to international jurisprudence, which had repeatedly affirmed that principle of customary law. Furthermore, it could be inferred from the language of the draft that the general rule set out in such judicial decisions, namely, that save for special agreements, nationality was obtained through a systematic interpretation of article 3, paragraph 1, of the draft read in conjunction with article 18. Nevertheless, the latter principle went further, since it excluded the application of the draft articles "where, and to the extent that, they are inconsistent with special treaty provisions". Therefore, a determination would have to be made as to whether the provisions of a special treaty were consistent with the draft articles, which could give rise to a degree of uncertainty and resulting conflicts of interpretation, a situation that would not be desirable. Conversely, if one were seeking assistance from the commentary on the draft, then it should be noted that it was only there that agreements on the reciprocal protection of investments had been taken into account; while that was certainly appropriate, there were other agreements that should have been included in the commentary.

62. Satisfactory amendments had been made to chapter III of the draft articles, concerning legal persons, since it went from article 9, dealing with the general rule established by the International Court of Justice in the *Barcelona Traction* case, to article 11, which included some exceptions for the protection of shareholders. Some doubts arose when the general rule was made more specific by requiring a connection between the company and the State. First, if with regard to the first condition the term "formation" was used instead of "incorporation" because it was a broader term, note should be taken of the confusion that might create in the legal systems of numerous States, since it was applicable to the "other legal persons" referred to in draft article 13. For that reason, it would be better not to depart from the term used in the Court's decision. With regard to the second condition established in that influential decision, "seat of its management" had been added to the condition of "registered office" in article 9; that might be acceptable if "management" were qualified as "effective". However, the addition of "some similar connection" had taken things a step further; that should be deleted, since the recourse to similarity made that formulation too open, despite the fact that the commentary indicated the need for a connection similar to that of "registered office" or "seat of management".

63. With regard to draft article 11, on the protection of shareholders, the negative wording which had been adopted was satisfactory, as were the cases envisaged in that exception to the general rule, which, according to the commentary, should be interpreted in a restrictive manner in order to prevent a plethora of international claims by different States. He had reservations with respect to paragraphs 9 and 10 of the commentary since they both cited the opinion, held by three judges of the International Court of Justice in the *Barcelona Traction* case, in favour of broader intervention by the State of nationality of the shareholders. That did not seem appropriate, since the repeated mention of a minority opinion weakened the rule embodied in that decision. Furthermore, it was not

at all consistent with the conclusion reached in paragraph 11 of the commentary.

64. Finally, article 19 on ships' crews should be excluded from the draft because, among other things, it introduced a special case governed by the law of the sea (specifically, by article 292 of the United Nations Convention on the Law of the Sea) into a set of general rules. Furthermore, the introduction of that case meant a shift in the overall thrust of the draft, which upheld the general rule of diplomatic protection by the State of nationality while permitting an exception for the State of nationality of the ship; that would open up the possibility of double claims being presented. Nor would it be consistent with international practice, which held that such protection was normally exercised by the flag State.

65. **Mr. Mzeme-Mba** (Gabon) said that the issue of diplomatic protection was currently one of the clearest manifestations of the principle set out in Article 2, paragraph 4, of the Charter of the United Nations, according to which all Member States of the Organization should refrain from the threat or use of force in their international relations. He recalled that many conflicts that had tarnished the history of international relations had originated in an intervention by one State on behalf of a national residing in a foreign country.

66. Draft article 1 on the definition and scope of diplomatic protection seemed largely satisfactory, although some clarification would be necessary in order to ensure harmony with the set of draft articles as a whole, since it appeared to take into account only the criterion of nationality, whereas draft article 8 included other criteria for the exercise of diplomatic protection by a State, namely, in the cases of refugees and stateless persons. The definition should therefore be reworked; to that end, paragraph 2 from draft article 3 could be added to draft article 1. That paragraph in fact complemented the definition of diplomatic protection as proposed in draft article 1.

67. Turning to Chapter II, he stressed the need to allow States the discretionary power to set standards for the attribution of nationality; it was not in fact appropriate for international law to establish any limits in that regard. Draft article 4 could have contained a specific reference to the domestic legislation of States, as had been the case in the jurisprudence of the International Court of Justice as well as in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, article 2 of which stated that any question as to whether a person possessed the nationality of a particular State should be determined in accordance with the law of that State. Furthermore, draft article 4 did not appear to have taken into account the usual criterion adopted under the laws of most States, which established a clear distinction between nationality of origin and acquired nationality. Use of the word "acquire" implied that the Commission was referring only to cases of acquired nationality.

68. As for draft article 7, on multiple nationality, which introduced the concept of predominant nationality, although he acknowledged that diplomatic protection was difficult to exercise in cases where an individual held the nationality of both the applicant State and the State which had committed the wrongful act, the solution proposed in the draft article seemed contradictory. The concept of nationality should be purely a concept of law separate from any consideration of the facts. A concept such as predominant nationality would call into question the principle of the sovereign equality of States. If the Commission's intention was to distance itself from the traditional concept of excluding cases of double nationality from diplomatic protection, it would have been preferable to refer to the criterion of the International Law Institute, which in September 1965 had declared that an international claim on behalf of an individual possessing the nationality of both the applicant State and the respondent State was inadmissible, unless the individual possessed a preponderant bond with the applicant State. The Institute had added that the criteria for determining the preponderant nature of an individual's bond were: his usual place of habitual residence, the State in which he habitually exercised his civil and political rights, and other bonds which would indicate an effective link of residence and interests in and attachment to a State. That solution had the dual advantage of reaffirming the principle of sovereign equality of States and defining it in relation to previously established facts.

69. With regard to draft article 8, he noted that the cases of refugees and stateless persons were dealt with in the relevant international conventions and treaties, but those international legal instruments did not deal directly with diplomatic protection of that category of persons; in fact, they appeared implicitly to exclude them. The Commission was therefore taking an

important step in the development of international law and, given the considerable improvement it would bring in the status of refugees and stateless persons, his delegation supported draft article 8 without reservations.

70. Turning to the controversial issue of the protection of shareholders in a corporation, he expressed support for draft articles 11, 12 and 13 as submitted by the Commission. Given that jurisprudence in that area was often not consistent, it was for the Commission to adopt a middle ground which took into account confirmation of the principle whereby the State of the shareholders in a corporation could not exercise diplomatic protection on behalf of those shareholders in the case of an injury to the corporation, but which would at the same time include exceptions to that principle, allowing the State of nationality of the shareholders to exercise diplomatic protection, in particular when the shareholder was directly injured in his individual rights and above all when the State of nationality of the corporation was alleged to be responsible for the injury it had sustained.

71. Turning to draft articles 14, 15 and 16 concerning the exhaustion of local remedies rule, although he agreed that local remedies must be exhausted before any international claim could be made, he was somewhat sceptical with regard to the exceptions set out in draft article 16. The only purpose of paragraphs (a), (b) and (c) of that article would seem to be to evaluate the good or bad faith of a government in exhausting local remedies. Since institutions for the administration of justice varied from one country to another, he wondered how the conduct of a State could be evaluated in that context. His delegation believed that the conduct of a government should be evaluated *in abstracto* using the "reasonable man" notion. As for paragraph (d), any waiver must be expressly stated and not implied.

72. **Mr. Pager** (Mexico) said that the practice of States relating to the requirement that the conduct of a claimant must be blameless, meaning that his own conduct must not have caused the alleged injury, in order to request that his State exercise diplomatic protection, was far from consistent. His delegation therefore welcomed the Commission's decision to consider that issue once again at its next session.

73. The well-established norm of customary international law according to which local remedies must be exhausted in due time and form as a prerequisite for undertaking an international claim included not only submission of a claim to ordinary tribunals but also to any local authorities empowered to provide internationally acceptable, effective and adequate redress, in respect of the respondent State. In accordance with numerous judicial decisions and most doctrine, the Commission had indicated in its report that the injured alien "is not required to approach the executive for relief in the exercise of its discretionary powers". Diplomatic protection was a central pillar of Mexico's foreign policy. In cases involving Mexican citizens sentenced to death, his Government had maintained in various international forums, including before the International Court of Justice, that mechanisms for executive clemency did not constitute an adequate means of redress because such measures were different from judicial remedies, tended towards confidentiality or secrecy, and excluded standards of legal due process and equality of the parties. Furthermore, decisions resulting from such mechanisms did not allow for appeal and were based principally on considerations of a political nature.

74. His delegation had expressed its disagreement with the previous text of draft article 19 on diplomatic protection for the members of ships' crews. The current text was correct, since it indicated clearly that it was for the State of nationality of the members of the crew of a ship to exercise diplomatic protection. In addition, the right of the State of nationality of the ship to seek redress on behalf of such crew members, irrespective of their nationality, could not be considered to fall under the category of diplomatic protection, precisely due to the absence of the bond of nationality.

75. **Mr. Choi Suk-inn** (Republic of Korea) said that he would focus on draft articles 9, 17, 18 and 19 on diplomatic protection, adopted by the Commission on first reading. He agreed with the basic rule under draft article 9 that the State of nationality of a corporation could exercise diplomatic protection with regard to an injury to that corporation. It was, however, of particular importance to provide clear guidance in determining the State of nationality of a corporation in order to avoid any possible confusion about the right of a State to exercise diplomatic protection.

76. With regard to the criteria used to identify the State of nationality of a corporation, his delegation had little difficulty with the place of incorporation and the presence of the registered office of the company in the

State of incorporation in accordance with its law, as clearly affirmed by the International Court of Justice in the *Barcelona Traction* case. However, the criterion of "the seat of its management or some similar connection" needed to be further clarified, because the ambiguity of that phrase might unnecessarily expand the scope of the State of nationality of a corporation, even if it was assumed that the phrase in question should be read in the context of a registered office or seat of management.

77. The Commission should consider combining draft articles 17 and 18; there was no need to separate them. Given that the traditional right of diplomatic protection pertained to a State, other remedies or dispute settlement mechanisms constituted *lex specialis*, and had priority over remedies pursuant to diplomatic protection.

78. With regard to draft article 19, he reiterated that the right to seek redress on behalf of crew members should rest primarily with the State of nationality of the ship, not the State of nationality of the crew members. However, the protection exercised by the flag State on behalf of crew members could not be considered to fall under the traditional notion of diplomatic protection. By combining two different concepts, the traditional right of the flag State and the concept of diplomatic protection, draft article 19 was introducing a rule hitherto unknown in international law. His delegation believed that draft article 19 should either be excluded from the ambit of diplomatic protection or should be confined to the rule of contemporary international law which entitled the State of nationality of a ship to seek redress on behalf of crew members.

The meeting rose at 12.25 p.m.

United Nations

A/C.6/59/SR.19

General Assembly

Fifty-ninth session

Official Records

Distr.: General
15 December 2004
English
Original: Spanish

Sixth Committee

Summary record of the 19th meeting
Held at Headquarters, New York, on Wednesday, 3 November 2004, at 9.30 a.m.

Chairman: Mr. Bennouna .... (Morocco)
later: Mr. Dhakal (Vice-Chairman) .... (Nepal)

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The meeting was called to order at 9.45 a.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Ms. Škrk** (Slovenia) said that the draft articles on diplomatic protection were well balanced and provided a good starting point for the preparation of the text to be submitted on second reading. Slovenia did not contest the International Law Commission's position that recourse to diplomatic protection was a right of States, although it had initially emphasized the human rights dimension of contemporary diplomatic protection. With regard to the State of nationality of a natural person, addressed in draft article 4, Slovenia did not dispute the rule of effective nationality established by the Commission, which was less stringent than the rule suggested in the *Nottebohm* case. Draft article 4 also contained a non-exhaustive list of several means of acquiring nationality, including succession of States. While it was true that succession of States affected the nationality of a great number of persons, both natural and legal, the acquisition of nationality by a natural person by succession of States was not in itself a form of acquisition of nationality. The legal effects of nationality acquired by that means fell within one of the established means of acquisition: birth, descent or naturalization.

2. With regard to continuous nationality, her delegation had some reservations about the changes of nationality envisaged in draft article 5, paragraph 2; that question should be approached with great precision and care in order not to deviate from the basic rule that it was the State of nationality at the time of the injury which was in fact entitled to exercise diplomatic protection. The joint presentation of a claim on behalf of two or more States of nationality of a natural person holding dual or multiple nationality with respect to a wrongful act of another State could be regarded as an example of the progressive development of international law. Despite the existence of some practice to the contrary, the same view could be taken of the rule on multiple nationality and claims against a State of nationality contained in draft article 7. That rule departed from the traditional position disallowing, in the case of multiple nationality, the exercise of diplomatic protection against a State of which the person concerned was also a national.

3. Her delegation was inclined to accept the Commission's view that one State of nationality might exercise diplomatic protection against another State of which the person was a national, provided that the nationality of the first State was predominant at the time of the occurrence of the injury and at the time of the presentation of the claim. The criteria for determining predominance were outlined in paragraph 6 of the commentary to draft article 7 and were based mainly on the criteria developed in the practice of States. However, her delegation was somewhat reluctant to have certain subjectiv[illegible]ns, such as language, number of visits, and family ties, listed among those criteria. Slovenia had always believed that the State of residence of stateless persons or refugees should be entitled to exercise diplomatic protection on their behalf and it therefore supported the inclusion of draft article 8 in the current text.

4. With respect to draft articles 9, 10 and 13, although her delegation did not contest the exercise of diplomatic protection in respect of corporations and other non-State legal entities, it had some reservations concerning the protection of shareholders within the context of diplomatic protection, despite the existence of some legal precedents in that field. In particular, draft article 12, on direct injury to shareholders, called for additional analysis. It was not always easy in practice to draw a distinction between the rights of a corporation and those of its shareholders, for that distinction depended primarily on the domestic legislation of the corporation's State of nationality. Notwithstanding those difficulties, there must be no discrimination against foreign shareholders, and the property rights deriving from their shareholder status must be fully respected.

5. Although her delegation supported in principle the Commission's approach to the requirement of exhaustion of local remedies, it suggested that the expression "whether ordinary or special", in reference to judicial and administrative courts or bodies, should be deleted from the definition of local remedies contained in draft article 14, paragraph 2; the term was somewhat superfluous and ambiguous, the more so if it was intended to refer to a State's highest courts, for such courts were not special. An individual's access to a State's highest courts must be examined in the light of the jurisdiction of the court in question, on a case-by-case basis and within the ordinary meaning of

exhaustion of local remedies as developed in international law.

6. Her delegation was in favour of retaining draft article 19, which stated the right of a ship's State of nationality to seek redress on behalf of its crew members when they had been injured as a result of an injury to the ship by another State.

7. **Mr. Gumbley** (Australia) said that his delegation remained particularly interested in the subject of diplomatic protection of corporations and their shareholders, given the difficulty of codifying workable rules in that area. It noted the approach taken by the Special Rapporteur in draft article 9, where he endorsed the fundamental principle enunciated in the *Barcelona Traction* case, and in draft article 11, which set out some exceptions to that principle in order to protect foreign investors. The Australian delegation further noted the altered language on the requirement of continuous nationality of corporations in draft article 10.

8. On the question of diplomatic protection of a ship's crew by the flag State, addressed in draft article 19, the law of the sea, including the relevant provisions of the United Nations Convention on the Law of the Sea, covered the issue adequately; it should therefore be excluded from the draft articles.

9. Turning to the topic of international liability, he reiterated his delegation's view that the guiding principle should be that the innocent victim should not bear the loss, and that the primary responsibility for compensation for such loss should rest with those in command or control of the activity at the time of the incident. That point might be incorporated into the objective of draft principle 3. In the case of damage to the environment, in some circumstances it might take several years for the damage to come to light. Given that draft principle 4 provided for the possibility of limitations, such limitations should take into account the time elapsed before the damage was perceived. The procedure for assessing compensation for environmental damage needed further development. With regard to draft principle 5, Australia supported the taking of prompt and effective response measures by the State, if necessary with the assistance of the operator, or, where appropriate, of other entities, for that was an essential means of keeping transboundary damage to a minimum. Australia would welcome the inclusion of a principle which made it clear that the draft principles were without prejudice to the rights and obligations of the parties under rules of general international law concerning the international responsibility of States. It reserved judgement on the final form which the work on the topic should take until it had given due consideration to the draft articles.

10. **Mr. Rosand** (United States of America), referring to international liability for injurious consequences arising out of acts not prohibited by international law, said that the draft principles were aiming in the right direction and that international regulation in that area ought to proceed by means of careful negotiations tailored to specific issues and particular regions; such negotiations should address in detail such questions as environmental impact assessment, prevention measures and notification. Experience taught that different types of hazardous activity required different solutions, that different legal systems might require different methods, and that States at different levels of economic development might require different approaches. Recommendatory principles which took such efforts into account and supported them could make an appropriate contribution. It was particularly appropriate that the draft principles should be recommendatory, for they were innovative rather than descriptive of current law or State practice. Since there was no consensus on liability or loss allocation in the event of harm arising out of acts not prohibited by international law, it was important that the draft principles should not be presented in a form which might be construed as a codification of customary international law; in that regard, his delegation applauded the work done by the Commission.

11. **Mr. Serradas Tavares** (Portugal), referring to the draft articles on diplomatic protection and specifically to article 3, paragraph 2 thereof, said that the exception to the general rule laid down in that provision might not be sufficient under the current international legal system; for instance, it might not cover the right of any State members of the European Union to offer diplomatic protection to citizens of other member States, provided that they had no diplomatic representation in a third State's territory. A third paragraph might therefore need to be added in order to expand the scope of the exception, bearing in mind that the problem might also arise in relation to integration processes throughout the world.

12. With regard to draft article 8 (Stateless persons and refugees), his delegation believed that the

requirement of both lawful and habitual residence set too high a threshold and could lead to a lack of effective protection for the individuals involved. He therefore invited the Commission to give due consideration to that issue when it embarked on the second reading of the draft articles.

13. With respect to draft articles 11 and 12 on the issue of shareholders as autonomous subjects of diplomatic protection, his delegation considered that the protection provided to shareholders was perhaps too generous; it departed from existing customary international law and thus did not constitute a "progressive" development of international law. A careful analysis of the articles and the commentaries thereon showed that they had been drafted solely on the basis of the *Barcelona Traction* case and covered matters not specifically addressed by the Court. Thus, innovation rather than progressive development was proposed in the draft articles. The Commission's proposals were based not on solid arguments given by the International Court of Justice, but on prognosis reasoning. His delegation's main concern was whether a shareholder, as either a natural or a legal person, should benefit from special protection other than that provided to States' nationals in the draft articles. In the first place, his delegation saw no added value in the specific provisions concerning shareholders, as compared with the protection afforded to nationals, in cases where a shareholder was directly injured by a State's act; Portugal wondered whether, in that instance, protection should not be granted to them in general terms as nationals rather than shareholders. Second, the draft articles were meant to protect nationals as such; the question was whether the provision of special protection for shareholders would not protect the investment rather than the national and whether such protection, which would constitute positive discrimination in favour of shareholders, would be justifiable. His delegation believed that the protection of shareholders as investors would be better grounded within specific instruments of international law, such as bilateral treaties for the protection of foreign investments, as draft article 18 seemed to recognize, or at least accept. Third, most direct injuries to shareholders were produced in violation of their individual rights, which were afforded, primarily, if not solely, by domestic rather than international law.

14. His delegation understood that similar difficulties concerning other issues relating to the scope of the draft articles were to be resolved on second reading. They included the possibility of widening the scope to include not only protection of ships' crews and of shareholders, but also the issue of functional protection of nationals employed by international organizations and the question of diplomatic protection in situations where a State or an international organization administered a foreign territory or a State, issues which Portugal had raised in the past.

15. With respect to international liability for injurious consequences arising out of acts not prohibited by international law, although his delegation agreed in general with the balance established between the role of the State and that of the operator as the primary subject of liability, it considered that the role of the State could be made more decisive in view of the fact that the State, not the operator, was the subject of international law; that the State had prima facie responsibility for providing adequate compensation according to the principle of international law that the State was liable for acts emanating from its territory; and that the State should establish international or domestic mechanisms to recover costs from the operator.

16. As to the final form of work on the topic, his delegation still believed that it should be a set of draft articles, rather than principles, that would complete the draft articles on prevention already adopted by the Commission and that could, in due course, lay the groundwork for an international convention on liability in the case of transboundary harm arising out of hazardous activities. Portugal hoped that the Commission would take that concern into account when embarking upon the second reading of the issues relating to prevention and allocation of loss, the two components of the topic of liability.

17. **Ms. Kamenkova** (Belarus) said that some elements of the draft articles, particularly the innovative ones reflecting progressive development of the rules of diplomatic protection, required further study by Governments.

18. Her delegation considered Chapter II of the draft articles to be well thought out and well balanced. Generally speaking, the prior condition for the exercise of diplomatic protection by a State was that the natural person requesting such protection must hold the nationality of the State which was prepared to provide it — in other words, there must be a solid legal link

between the physical person and the State. The draft articles contained exceptions which allowed States to exercise diplomatic protection in respect of stateless persons and refugees who were permanently resident in their territory when an injury occurred. Those exceptions were perfectly justified, since they reflected the general tendency of contemporary international law to create conditions conducive to the effective protection of the rights and interests of that category of especially vulnerable persons, who had lost their link to their country or other place of habitual residence.

19. On the other hand, her delegation had serious doubts regarding the provision in draft article 7 that would allow the State of predominant nationality of a person to bring a claim against the State of that person's other nationality. The concept of "predominant nationality" was not well defined in international law and, in some cases, entailed subjective factors, with the risk that ill-intentioned persons might exploit multiple nationality in order to benefit from diplomatic protection. Her delegation would prefer to consider the possibility of removing those provisions from the draft articles.

20. While her delegation understood the importance of the principle that a corporation should receive protection from its State of nationality rather than the State of nationality or citizenship of the shareholders, it seemed logical and acceptable to include in draft article 11 an exhaustive list of special circumstances in which the protection of shareholders could be exercised by their State of nationality or citizenship. Her delegation proposed that consideration should be given to combining the provisions of draft articles 11 and 12 in a single article in the light of their common purpose.

21. With respect to draft article 13, her delegation could agree to the inclusion of a special article on the conditions for granting other legal persons, mutatis mutandis, the same protection as corporations, but it would prefer fuller unambiguous wording on that point. Her delegation believed that the diplomatic protection of other legal persons should be strictly limited to defending their commercial and property rights. Belarus saw no urgent need to establish rules that would allow diplomatic protection to be extended to non-governmental organizations and did not believe that would be justified; in performing their international functions, NGOs did not have sufficient links to their State of nationality and had, therefore, no claim to its protection.

22. Her delegation reiterated the need to exclude protection of ships' crews from the draft articles, and also welcomed the decision not to include rules on functional protection in the context of the rights and interests of international organizations.

23. **Mr. Kelnan** (Israel) said, with regard to diplomatic protection, that it was important to seek a practical role for the draft articles and to focus on real-life issues, based in State practice. The Commission and many States were significantly concerned about the scope of nationality rules for legal persons. Further thought should perhaps be given to achieving a balance of interests between the nationality of the corporation and the nationality of shareholders. The rights of shareholders must have a significant role in the draft articles.

24. One of the potential causes of change of nationality not noted in the commentary to draft article 5 was the transfer of territory from one State to another, as dealt with in the decision adopted by the International Court of Justice in 2002 in the case concerning the land and maritime boundaries between Cameroon and Niger, and in previous judgements.

25. The close relationship between the topic of diplomatic protection and that of State responsibility contributed to the need felt by States to ensure that such documents had a limited form and a non-binding nature, and to have flexibility in carrying out affairs of State without a perception of stifling limitations.

26. As to the form that the draft articles should take, Israel supported the view of many States — reflected in the approach adopted by the Commission — that a set of non-binding principles should be sought that could be used by States as appropriate. As in the case of other documents dealing with matters relating to the environment, it was vital to incorporate flexibility into regional solutions.

27. It was worth noting that, in draft principle 2, the definition of the term "damage" included the word "damage". In addition, the chapeau of the definition might read, "and may include" rather than "and includes", since the damage did not necessarily include all the details listed afterwards. Neither paragraph 3 of draft principle 4 nor paragraph 3 of draft principle 6 seemed to reflect adequate appreciation for the national

legislation of a State. The "requirement" that appeared in paragraph 3 of principle 4 should be limited to requirements that were compatible with local law. Similarly, paragraph 3 of principle 6 should be expressly subject to the national legislation of a State.

28. **Ms. Ow** (Singapore), said with respect to draft article 2 (Right to exercise diplomatic protection), that she fully agreed with the opinions espoused in the commentary, namely, that international law imposed no obligation or duty on a State to exercise diplomatic protection on behalf of a national; it was a discretionary power, the exercise of which could be determined by considerations of a political or other nature, unrelated to the particular case. That must be so, since the conduct of international relations was a delicate and sensitive matter which must take into account considerations of a multifaceted nature.

29. Turning to draft article 8 (Stateless persons and refugees), she said the commentary confirmed that the article was an exercise in the progressive development of the law and departed from the traditional rule that only nationals could benefit from the exercise of diplomatic protection; it was also described as an exceptional measure introduced *de lege ferenda*. Although Singapore understood the underlying concern with enhancing the protection of stateless persons and refugees, it also noted the valid questions posed by other delegations on whether or not it was appropriate to address that issue within the context of diplomatic protection.

30. Draft article 17 (Actions or procedures other than diplomatic protection) contained saving clauses for the right of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered due to an internationally wrongful act. As the commentary stated, the article was primarily concerned with the protection of human rights by means other than diplomatic protection while also preserving the rights of States, natural persons and other entities under procedures other than diplomatic protection. The arguments for and against the inclusion of such a saving clause had been comprehensively presented in the fifth report of the Special Rapporteur; Singapore was reflecting on the meaning of draft article 17 and the need for its inclusion.

31. The commentary on draft article 18 (Special treaty provisions) suggested that its underlying intention was to clarify the relationship between the draft articles and treaties regulating and protecting foreign investment. Singapore understood the reasons for such an approach, in the light of the increasing number of investment treaties and would give positive consideration to its inclusion. It was unclear, however, whether the phrase "special treaty provisions" was clearly understood and recognized in that context. What was the difference between "special treaty provisions" and other treaty provisions, for example? Was there an implied hierarchy such that the principles of the draft articles applied to the latter but not the former? Furthermore, if the principal objective of the article was to clarify the relationship between the draft articles and investment treaties, might that be achieved through explicit reference to investment treaties or provisions in free trade agreements?

32. The commentary on draft article 19 (Ships' crews) explained that its purpose was to affirm the right of the State or States having the nationality of the ship's crew to exercise diplomatic protection on their behalf, while recognizing that the State of nationality of the ship also had a right to seek redress on their behalf, irrespective of their nationality. In that regard, the commentary cited the available literature, jurisprudence and examples of State practice to support the position that the flag State could seek redress on behalf of non-national crew members. Leaving aside the latter question for the time being, Singapore welcomed the recognition by the Commission that any such right could not be categorized as diplomatic protection, and noted that the majority of speakers in the Committee had opposed the inclusion of a provision recognizing the right of the flag State to exercise diplomatic protection on behalf of non-national crew members. Care must be taken to ensure that the inclusion of an article on the issue of ships' crews did not inadvertently run counter to such objections. Singapore noted that State practice on that topic was neither universal nor extensive, and that international arbitral awards are inconclusive on the right of a flag State to extend protection to non-national crew members. Her delegation believed that the flag State's ability to seek redress for non-national crew members depended on the facts of each case, the nature of the complaint, the redress sought and the legal regime under which it was sought. In other words, it might not necessarily exist in every scenario. Therefore, the Commission might wish to consider

whether it would be useful to provide a clarification in the commentary on the article, if it were included.

33. **Ms. Dascalopoulou-Livada** (Greece) said that draft articles 1 to 5 were acceptable to her delegation. Draft article 6, paragraph 2, which provided that two or more States of nationality might jointly exercise diplomatic protection in respect of persons having dual or multiple nationality, was a novel provision that fell within the activities of the Commission which promoted the progressive development of international law.

34. Her delegation was also in favour of draft articles 7 and 8. The provisions regarding the exercise of diplomatic protection in respect of stateless persons and refugees also constituted a positive step which she wholeheartedly supported.

35. Chapter III of the draft articles on diplomatic protection of legal persons had been significantly improved, especially with the inclusion of the corporation's seat of management (registered office) among the criteria for deciding the nationality of the corporation.

36. She retained some doubts on draft article 16 regarding exceptions to the local remedies rule. Indeed, the plethora of grounds for dispensing with the rule of exhausting local remedies tended to annihilate the rule. Furthermore, the wording was vague and, in the case of subparagraph (c), complicated. As a result, there was a strong possibility of overlap in subparagraphs (a), (b) and (c). For that reason, the Commission should come up with a text indicating succinctly and clearly why the rule on the exhaustion of local remedies should be set aside.

37. Regarding Part Four of the draft articles, her delegation was perplexed by the solution adopted in draft article 17, which dealt with actions or procedures other than diplomatic protection. According to her reading of the phrase "without prejudice", the text, as it currently stood, seemed to place diplomatic protection as such on an equal footing with other actions or procedures under international law. Given that the remedies provided for by human rights treaties were lex specialis vis-à-vis the rules on diplomatic protection, they should have priority over the latter.

38. Draft article 18 dealt with other special treaty provisions, particularly those on bilateral investments and dispute resolution to which, however, treatment different from that afforded by draft article 17 to human rights treaties had been reserved. Seeing no reason for such a differentiation between draft articles 17 and 18, she suggested that the same treatment should be afforded to both situations, irrespective of whether a human rights or investment protection or dispute settlement mechanism was employed. Concerning human rights in particular, diplomatic protection might be invoked in cases where the respondent State failed to implement the judgement or other ruling of the relevant court. In general, she agreed with those Commission members who had supported the merging of draft articles 17 and 18.

39. The Greek delegation had consistently and strongly supported the extension of the possibility for the flag State to afford diplomatic protection to ships' crews irrespective of the nationality of their ship. That accorded with the predominant role that such State played with regard to the ship, as expressly recognized by the international law of the sea. In that connection, she found particularly convincing the reasoning of the International Tribunal on the Law of the Sea in the *Saiga* case described in paragraphs 62 to 65 of the fifth report of the Special Rapporteur. Although she agreed with the inclusion of a new draft article 19, she failed to see any valid reason why the flag State's protection of a ship's crew should be limited to the case of crew injuries sustained "in the course of an injury to the vessel". Clearly, that provision would mostly be needed in the case of unlawful detention of the crew, which most probably would have been preceded by the seizure and detention of the vessel. She did not feel certain that "injury to the vessel" would cover its seizure and detention alone in the absence of material damage to it. Even in that event, however, it would be sufficient that injury to the crew had been incurred because of its relationship to the ship. Similarly, the issue of exhaustion of local remedies should also be examined with a view to providing a specific exemption in the case of the crew. Second, her delegation did not share the view that the principle of diplomatic protection being exercised by the State for the benefit of its nationals needed reiteration. The purpose of the draft article should be simply to afford the protection of the flag State to the ship's crew regardless of their nationality. For that reason, her delegation preferred the original text proposed by the Special Rapporteur.

40. Regarding the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Greek delegation welcomed the Commission's preference for a regime of strict civil liability not based on the notion of fault. Such a regime would be extremely beneficial to victims of hazardous activities not prohibited by international law since it relieved them from having to prove that the person or entity causing the damage was at fault in order to obtain adequate compensation.

41. Under draft principle 2, the report indicated that loss of earnings would be compensated under subparagraphs (i) and (ii) of paragraph (a) if connected with bodily harm or property damage, while pure economic loss connected with damage to the environment would be covered under subparagraph (iii) of the same paragraph. That loss category raised delicate issues of causality, for which reason it would be preferable to define loss of income within the context of subparagraph (iii), as reflected in draft principle 2 of the original text proposed by the Special Rapporteur. She was also of the view that the principle should contain a definition of response measures, as well as measures of reinstatement, since those terms often occurred in the text with no unanimity as to their exact meaning in practice.

42. While damage to the environment per se was actionable, as the commentary on draft principle 3 affirmed, stark economic realities made that extremely difficult to achieve and explained why conventions such as the 1992 Lugano Convention had been unsuccessful. That was also why more recent instruments such as the Kiev Protocol, in its article 2 (d) (iii), had recognized as damage "loss of income directly deriving from an impairment of a legally protected interest". The idea had been to arrive at a compromise formula which would limit claims to those in respect of an interest which was protected specifically by legislation. Furthermore, that draft principle, in contrast to existing conventions on civil liability, enunciated the right of persons and States which had suffered injuries to invoke its provisions. That was a welcome innovation, particularly since the draft principle recognized that environmental damage as such should be compensated and that, in principle, only the State would have the locus standi necessary to formulate such a claim.

43. The first paragraph of draft principle 4 imposed on States the obligation to take measures in order to secure compensation for persons who had suffered damage. The solution which consisted of leaving the attribution of liability to the discretion of the State without indicating who would eventually assume that liability had the obvious shortcoming that injured parties would not have a direct right of action before the courts, a right that would be operative without invocation of the relevant domestic legislation. Should the draft develop towards the adoption of a convention, its influence, if the aforementioned solution was maintained, would be rather limited precisely because of legislative action of the State, which would, in addition, have a rather wide margin of discretion with regard to the compensation mechanism it would adopt. Paragraph 2 of the draft article provided that those "measures should include the imposition of liability on the operator". Such an application of the "polluter pays" principle was subsequently mitigated by the provision pursuant to which the responsibility of another person or entity could also be included. That formula, in conjunction with paragraph 13 of the commentary on the draft principle and particularly paragraphs 11 to 14 of the commentary on draft principle 3, placed the "polluter pays" principle in competition with other options, thus allowing for a flexible approach to the subject. The Greek delegation believed, however, that such an approach did not coincide with recent practice which was placing increasing emphasis on the "polluter pays" principle. Accordingly, she would support a bolder formulation of paragraph 2 to confirm the predominant role of that principle in the attribution of liability.

44. Paragraph 3 of draft principle 6 provided that every State should ensure that its courts were competent to be seized of cases of liability but gave no specific indication of which State was to assume that obligation. The Commission must propose criteria for identifying the forum States in case of damage because, as currently formulated, that paragraph gave the impression of intending to establish universal civil jurisdiction.

45. Her delegation was firmly of the opinion that by its very nature, a text on civil liability had to take the form of a legally binding instrument, such as a framework convention, provided that a clear definition of hazardous activities was adopted to constitute its scope of application *ratione materiae*. Even though regional agreements would ultimately determine the choices most suited to their own particular areas of

geographical application, those choices had to fall within a particular spectrum. The function of the framework convention, therefore, would be to provide that guidance.

46. **Mr. Lindenmann** (Switzerland), referring to draft article 5 on diplomatic protection, recalled that the Commission had raised the question of whether the State of nationality should lose the right to exercise diplomatic protection in a case where the person changed nationality after the date of the official presentation of the claim but before the matter was resolved, and said that he believed the solution now proposed by the Commission in article 5 was unobjectionable. Although it was a State's right and not its obligation to exercise diplomatic protection, the new State of nationality of such a person was caught in a difficult situation: it was one thing for a State to decide from the outset that it did not wish to bring a claim in the exercise of diplomatic protection on behalf of a person; it was another, from the moral standpoint, for it to abandon the exercise of diplomatic protection in a procedure already initiated by another State on behalf of that person. Such difficulties did not arise in the context of the system currently proposed in article 5.

47. Instead, on the issue of protection of shareholders, the grounds for the solution proposed by the Commission in draft article 10, paragraph 2, and in draft article 11, subparagraph (a), were questionable. Although the commentaries on both provisions were persuasive, a balance had to be struck between two approaches to that difficult issue, and the internal logic of the proposed solution was not clear. According to his delegation's interpretation, if a State committed a serious internationally wrongful act against a corporation such that the corporation ceased to exist, only the State of nationality of the corporation could exercise diplomatic protection on its behalf. If, on the contrary, the injury caused by the internationally wrongful act was less serious, so that the existence of the corporation was not jeopardized, but the corporation ceased its activities for reasons not related to the injury, it would not be the State of nationality of the corporation but the States of nationality of the shareholders which would have the right to exercise diplomatic protection on their behalf. The solution set out in article 10, paragraph 2, and article 11, subparagraph (a), seemed paradoxical, at least from the vantage point of the shareholders. Indeed, the more serious the violation of their rights, the smaller the possibility that their States of nationality might initiate action to exercise diplomatic protection on their behalf.

48. That said, the draft articles on diplomatic protection were very positive and reflected elements of the progressive development of codification, especially with respect to the situation of stateless persons and refugees.

49. Regarding the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, Switzerland had been one of the countries that had asked for further consideration of the question of liability, and his delegation thought that the quality of the drafting exceeded expectations. As to the final form, it believed that the Commission had wisely decided not to draft a framework convention, and that the innovations of the draft would be better reflected in the form of principles.

50. **Ms. Armas García** (Cuba) said that her delegation, like others, believed that the late issuance of the report had reduced the possibility for Governments and competent national institutions to study it.

51. Cuba was concerned that the Commission had included new items in its current programme of work without explaining to the Committee how it planned to conclude work on the items already under its consideration for which, furthermore, it had been given a mandate by Member States. Any future consideration of the new items proposed by the Commission would have to depend on the decision taken in that respect by the Committee.

52. With regard to diplomatic protection, that should continue to be a discretionary right exercised by a State and not an international obligation, because it was incumbent upon the State to decide whether or not it would take up the cause of one of its nationals injured as the result of an internationally wrongful act by another State. Diplomatic protection had to be exercised only by peaceful means, in accordance with the norms of international law.

53. Concerning draft article 7 on multiple nationality and claim against a State of nationality, no exception should be made to the rule that in the case of a dual national, neither of the two States of nationality could exercise diplomatic protection and present a claim to the other State on behalf of that person, because the

non-liability norm must be upheld, as recognized in a number of instruments, among them the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, article 4 of which declared that "a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". Furthermore, Cuba considered that the concept of "predominant nationality" was ambiguous and that if it was decided to maintain the current approach of draft article 7, it would be very useful to include clear criteria for determining predominance for the purposes of diplomatic protection. Draft article 8 included elements of progressive development that should be weighed with caution so as not to depart from the legal regime in force for the protection of refugees.

54. With regard to draft article 9 on the State of nationality of a corporation, the latest formulation was more complete and avoided the difficulties that had arisen in that connection. Nevertheless, the concept of "some similar connection" could introduce a certain ambiguity, and the Commission would have to continue working on the matter to ensure greater legal certainty.

55. Concerning draft article 11, the Commission should give more consideration to the need to include a separate article on the protection of shareholders. They ought to be already protected under the articles on the protection of natural or legal persons, as appropriate. Also, Cuba supported the principle that no State could invoke diplomatic protection of one of its nationals if that person had not previously exhausted all available domestic remedies.

56. Lastly, concerning the possibility of drafting an article on the clean hands doctrine in the context of diplomatic protection, in Cuba's view that was an imprecise notion not fully accepted in international law and not recognized by all States, and therefore special treatment should not be given to the subject.

57. **Ms. Zabolotskaya** (Russian Federation) said, with regard to the topic of diplomatic protection, that the scope of the draft articles had been identified correctly, and that such topics as functional protection by international organizations, the clean hands doctrine, and questions of delegation of diplomatic protection could be easily set aside. At the same time, doubts remained concerning the provision in draft article 13 regarding "other legal persons", according to which the principles applicable to corporations set forth in draft articles 9 and 10 were to be applied "as appropriate" to diplomatic protection of other legal persons. Given the wide variety of legal persons and the practice of legal regulation of their status, the Russian Federation reiterated its proposal to withdraw the issue of "other legal persons" from the draft and, at the same time, to complement it with a clause to the effect that the articles were without prejudice to the right of diplomatic protection for legal persons that could not be considered "corporations" under draft article 11.

58. It was important to remember that the exhaustion of local remedies rule in draft article 15 applied only to an international claim or a request for a declaratory judgement and not to other diplomatic measures covered by the concept of diplomatic protection as defined in draft article 1.

59. More thought should be given to article 16, for when defining criteria for exceptions to the exhaustion of local remedies rule, such remedies should not a priori be called into question. In particular, there were doubts regarding the presence of subparagraph (a) along with the second part of the sentence contained in subparagraph (c) of draft article 16. In fact, the provision in paragraph 3 of the commentary on the draft article seemed unconvincing, for if it was common knowledge that "the local courts [were] notoriously lacking in independence", she wondered why an investor would risk investing in the country concerned. Furthermore, the "threshold" of exhaustion of local remedies set forth in draft article 16 seemed too low.

60. With respect to draft article 11, concerning the protection of shareholders, the structure appeared to be correct, inasmuch as the right to exercise such protection arose in exceptional cases only. Nevertheless, the formulation of the exceptions was too vague and might lead to confusion.

61. Lastly, the distinction between draft articles 17 and 18 was not clear; when comparing the regime of diplomatic protection with the protection mechanisms provided for in other rules of international law, the question arose in what circumstances one should be guided by the provisions of article 17 and in what circumstances by the provisions of article 18.

62. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, given the lack of unanimity on a

number of important issues relating to that theme, guidelines would be the most appropriate form for a final document, and it would be expedient to limit work on the topic to the scope of the draft articles as established in draft principle 1, i.e., significant damage, and to exclude from the scope of application of the principles environmental damage occurring outside the national jurisdiction.

63. Her delegation agreed with the model on loss allocation adopted by the Commission, which placed the main liability for compensation for damage caused on the operator. That approach was in keeping with the "polluter pays" principle enshrined not only in international law but also in Russian legislation.

64. Her delegation also agreed on the importance of participation by the State in the loss allocation scheme, above all to ensure that the victims were not left alone to bear all the losses resulting from the damage. Although there was no direct reference to the liability of the State in terms of compensation for loss, subparagraph (h) of draft principle 3 and draft principles 4 to 8 concentrated on the State's obligation to take the necessary measures to ensure prompt and adequate compensation for victims of transboundary damage. Lastly, the definitions contained in draft article 2 would need further analysis, as the arguments for including damage to the environment per se in the concept of "damage" were not fully convincing.

65. Her delegation expressed its support for the inclusion of two new topics in the current programme of work, i.e., "Expulsion of aliens" and "Effects of armed conflicts on treaties", and for the inclusion of "Obligation to extradite or prosecute (*aut dedere aut judicare*)" in the long-term programme of work.

66. **Ms. Villalta** (El Salvador) said, with regard to diplomatic protection, that when dealing with the codification and progressive development of international law, it was necessary to take into consideration the relevant provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, in particular article 36 thereof. The importance of that provision was reflected in advisory opinion OC-16 of the Inter-American Court of Human Rights and, at the international level, in the ruling of the International Court of Justice referred to by other speakers.

67. With regard to the principles governing nationality, conflicts of nationality must be mentioned from both the positive and negative standpoint, i.e., dual or multiple nationality and lack of nationality, and draft article 4 should distinguish between nationality acquired by birth (*jus soli* or *jus sanguinis*) and nationality acquired by naturalization.

68. Lastly, draft article 6 concerning dual or multiple nationality should take into account the rules of private international law that established the obligation of States to honour the nationality effectively in use, in accordance with the case law of the International Court of Justice, which had established the precedent of effective nationality.

69. **Mr. Khan** (Pakistan) said, with regard to the topic of diplomatic protection, that his delegation would submit written observations on all aspects of the draft articles.

70. With respect to international liability for injurious consequences arising out of acts not prohibited by international law (international liability in the case of loss from transboundary harm arising out of hazardous activities), his delegation agreed that any State had the right to engage in lawful activities. It must, however ensure that such activities did not harm other States and take measures to that end, or be held liable for the harmful consequences of its acts. It was difficult to draw up an exhaustive list of lawful activities involving a risk of harm, but it should be possible to establish an illustrative list.

71. Secondly, the expression "significant harm" raised difficulties for his delegation, as it would force a debate as to whether harm was significant or not and, in addition, as to who should decide that question. Pakistan might have accepted the term if a mechanism for dispute settlement had been in place. As no such mechanism existed, his delegation favoured the deletion of the word "significant" before the word "harm".

72. **Mr. De Vel** (Director General of Legal Affairs, Council of Europe) said that Europe wished to make its legal heritage available to the Commission in order to assist in its deliberations; in that context, he wished to present a brief summary of recent developments in the Council of Europe.

73. First, he noted that there were now 46 States members of the Council of Europe, following the accession of the Principality of Monaco. Furthermore, Protocol 14 of the European Convention on Human

Rights, reforming the procedures of the European Court of Human Rights, had been adopted, and preparations were under way for the third Council of Europe summit, to be held in Warsaw in May 2005.

74. With specific reference to the report of the Commission (A/59/10), he wished to highlight in particular the topic of jurisdictional immunities of States and their property. The Council of Europe envisaged making a contribution, in the form of a pilot study of State practice in that area, prepared by the Committee of Legal Advisors on Public International Law. The study should be published in the spring of 2005.

75. Another activity of the Committee of Legal Advisors that was of interest to the Commission concerned reservations to international treaties. The Committee functioned as a European observatory on reservations to international treaties, thus allowing member States to consider jointly, reservations that might give rise to objections. The reservations in question had been made by States members of the Council and by non-member States, and they related to European conventions and those concluded outside the Council of Europe. When a reservation presented difficulties, dialogue was initiated with the State concerned, in order to clarify the grounds for the reservation.

76. The Council of Europe was about to conclude a protocol to the 1997 European Convention on Nationality, which sought to prevent statelessness in relation to succession of States. The protocol was based on the practical experience acquired over recent years, and took into account the provisions of other international instruments, including the draft articles formulated by the Commission.

77. With regard to counter-terrorism, the Council of Europe had been working since November 2001 to make a concrete contribution to such efforts in three areas: strengthening legal measures against terrorism and its financial support, safeguarding fundamental values and, within a longer-term perspective, adopting measures to deal with the causes of terrorism in order to eradicate its roots, which were discrimination, racism, intolerance and extremism, and promote multicultural and inter-religious dialogue.

78. Since the introduction of the Council of Europe's plan of action, two instruments had been formulated: a protocol amending the 1997 European Convention on the Suppression of Terrorism, which had been opened for signature on 15 May 2003, and the guidelines on human rights and the fight against terrorism, approved by the Committee of Ministers in July 2002.

79. The Committee of Experts on terrorism was currently working on a new international legal instrument for the prevention of terrorism which covered, among other aspects, support for terrorism, the recruitment and training of terrorists, and the liability of legal persons, and which was intended to fill existing gaps in the legal sphere and in international counter-terrorism measures.

80. That was the case with the Convention on Cybercrime, which had entered into force on 1 July 2004, and whose scope extended beyond the continent of Europe. In addition to the 40 member States of the Council of Europe, the signatories of the Convention included Canada, Japan, South Africa and the United States of America. The Convention was the first international treaty on crime committed via the Internet and other international networks and it defined, in particular, offences relating to copyright law, computer fraud, child pornography and network security. Its main purpose was to formulate a common criminal policy aimed at protecting society against crime in cyberspace, notably through the approval of relevant laws and the promotion of international cooperation.

81. With regard to measures to combat trafficking in persons, the Council of Europe was making rapid progress in preparing a European convention against human trafficking, which could be concluded by the beginning of 2005.

82. In the field of bioethics, the Council had adopted the Convention on Human Rights and Biomedicine, the first international treaty in that area. Work was also being carried out on an additional protocol to the Convention, on human genetics, and on a draft instrument on research using human biological material. The Secretary General of the Council of Europe had sent a letter to the Governments of member States in order to bring to their attention the problem of trafficking in organs and to request information about measures adopted to prevent it.

83. Lastly, he highlighted the excellent cooperation that existed between the Council of Europe and the United Nations, and between the Council and the Commission.

84. **Mr. Mikulka** (Secretary of the Committee), referring to the date of issuance of the Commission's report (A/59/10), which several delegations had mentioned, said that the report had been issued on 24 September 2004, the earliest date of issuance in the past five years. As a result, the period for its consideration had been 36 days, which was also the longest in five years. On the day of its issuance, the report had been placed on the United Nations Official Documents System (ODS) and on the web site of the Commission in all official languages of the Organization. As had been stated on several occasions, the Codification Division, which was the substantive secretariat of the Commission, completed its work on the report within the five days following the closure of the Commission's session, and submitted it for processing by the United Nations Office at Geneva. From that point onwards, the Division had no further control over the process of translation and publishing of the report, which depended on factors determined by the Documents Control Section of the Department for General Assembly and Conference Management. Over the past two years, several other measures had been adopted in order to provide States with more and faster information concerning the progress of the Commission's work during its session and the results achieved. The Commission had set up a web site which contained information — updated almost on a daily basis — on the consideration of topics by the Commission during its session. The draft articles adopted by the Commission were also published on the site in all official languages at the end of the session, usually during the first or second week of August. The Codification Division was thus doing everything possible to keep delegations informed about the work of the Commission and would continue to do so.

85. *Mr. Dhakal (Nepal), Vice-Chairman, took the Chair.*

Agenda item 162: Observer status for the South African Association for Regional Cooperation in the General Assembly (A/59/234; A/C.6/59/1/Add.3 and A/C.6/59/L.21)

Draft resolution A/C.6/59/L.21

86. **Mr. Al-Hinai** (Pakistan) introduced draft resolution A/C.6/59/L.21 on behalf of its sponsors (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka).

87. **Ms. Ahmed** (Bangladesh) said that her delegation supported the draft resolution.

The meeting rose at 12.25 p.m.

United Nations A/C.6/59/SR.20

General Assembly
Fifty-ninth session

Official Records

Distr.: General
9 November 2004

Original: English

Sixth Committee

Summary record of the 20th meeting
Held at Headquarters, New York, on Wednesday, 3 November 2004, at 2.30 p.m.

Chairman:	Mr. Bennouna	(Morocco)
later:	Mr. Simon (Vice-Chairman)	(Hungary)
later:	Mr. Bennouna (Chairman)	(Morocco)

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Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*)

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The meeting was called to order at 2.45 p.m.

Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Mr. Henczel** (Poland) congratulated the Commission on completing the first reading of the draft articles on diplomatic protection and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities and said that the importance of the two topics for contemporary international law could not be overestimated.

2. During the second reading of the draft articles on diplomatic protection, his delegation would like the Commission to revisit some of the provisions originally proposed by the Special Rapporteur but not adopted on first reading. It should consider whether the clean hands doctrine was relevant to the topic and should be reflected in an article. In addition, some of the detailed provisions dealing with the protection exercised by international organizations or with diplomatic protection exercised against or in conjunction with international organizations should be reconsidered for inclusion. Although it was true that the right of functional protection exercised by international organizations was derivative in nature, that did not rule out the possibility of a parallel entitlement of a State and an international organization to exercise international protection in respect of the same person. The situation could be even more complicated: the organization might wish to exercise its functional protection in respect of its agent against the State of his or her nationality. Although the question of the priority of such rights and competing claims was still unresolved in existing law and practice, it was appropriate that even that uncertainty should be reflected to some extent in the draft articles.

3. With regard to the complex topic of international liability for injurious consequences arising out of acts not prohibited by international law, which had been on the agenda for a quarter of a century, the narrower, step-by-step approach of dividing the topic into the prevention and liability aspects had finally allowed the Commission to make significant progress. However, the draft principles adopted on first reading on the allocation of loss in the case of transboundary harm arising out of hazardous activities could stand to be expanded on second reading. It would be worthwhile to revisit some of the principles proposed by the Special Rapporteur in his second report, such as those dealing with the relationship with other rules of international law and with the settlement of disputes. The statement of the objective of the draft principles was overly condensed, jumbling together natural and legal persons and States as possible victims and mixing damage to the environment with other kinds of transboundary damage. With regard to the final form the text should take, his delegation thought that, despite their current formal differences, it would be possible and useful to combine the draft articles on prevention and the draft principles on allocation of loss into one instrument, preferably a convention, on international liability.

4. His delegation reserved the right to prepare and present more detailed comments on the draft documents on diplomatic protection and international liability during the coming year. With regard to the future work of the Commission, his delegation considered the two new topics proposed, "Expulsion of aliens" and "Effects of armed conflicts on treaties", to be suitable for codification and progressive development by the Commission. It also fully supported inclusion of the topic "Obligation to prosecute or extradite (*aut dedere aut judicare*)" in the Commission's long-term programme of work, in view of the timeliness of the topic with respect to international crime, including terrorism.

5. **Mr. Medrek** (Morocco) said that his delegation welcomed the adoption on first reading of the draft articles on diplomatic protection and the draft principles on international liability and was pleased at the progress made on reservations to treaties, responsibility of international organizations and shared natural resources. It thought that the new topics, "Expulsion of aliens" and "Effects of armed conflicts on treaties", were feasible, but that the Commission would have to establish priorities among the topics in its programme of work.

6. As the Commission had asked, Morocco would present written comments on the draft articles on diplomatic protection as a contribution to the second reading. His delegation's first impression was that the 19 draft articles were balanced and reflected customary law in one of the oldest areas of international law. It approved of the Commission's decision to opt for the traditional concept of diplomatic protection as a right of the State to be exercised at its discretion. Multiple nationality, dealt with in draft article 6, was a fact of

international life, but the Commission, during the second reading, should consider the question of competition among several countries claiming the exclusive right to protect one and the same person and how such a dispute could be resolved. The Commission had rejected the need for an effective link requirement with regard to nationality and thought that there was no reason why States of nationality might not jointly exercise a right attaching to each. However, what sounded simple in principle might prove to be difficult in practice. Draft article 7, which appeared to embody the principle of dominant nationality, was problematic. To speak of predominant nationality called into question the principle of the sovereign equality of States, especially since the Commission offered no criterion for determining predominance. Draft article 8 on the exercise of diplomatic protection in respect of stateless persons and refugees represented progressive development of law, since it departed from the traditional concept that a State might exercise diplomatic protection only with respect to one of its nationals. His delegation considered the solution appropriate, because it was in favour of protecting such persons with provisional status.

7. With regard to protection of shareholders of a corporation, the Commission should reconsider draft articles 12 and 13 to take into account the volatility of the status of shareholder in the modern international economy. His delegation questioned the exception stated in article 11, subparagraph (b), and felt that the Commission should not have derived a general rule from the conclusions of the International Court of Justice in the *Elettronica Sicula S.p.A. (ELSI)* case, which concerned a relationship between two States based on a treaty.

8. On the very important question of exhaustion of local remedies, his delegation found draft article 14 to be sound, since it codified the recognized rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. Of the exceptions to the rule set forth in draft article 16, his delegation supported the first exception, in subparagraph (a), where there was "no reasonable possibility of effective redress" and thought that the exception in subparagraph (b), where there was "undue delay in the remedial process" attributable to the State alleged to be responsible, was well established in human rights instruments, judicial decisions and legal writings.

9. The question of the protection accorded by the State of nationality of a ship to the members of its crew fell within the purview of the law of the sea. However, his delegation found the solution adopted by the Commission in draft article 19 acceptable, whereby the right of the State of nationality of the members of the crew to exercise diplomatic protection on their behalf was not affected by the right of the State of nationality of the ship to do the same.

10. The Commission had made commendable progress at its fifty-sixth session on the topic of international liability for injurious consequences arising out of acts not prohibited by international law by adopting the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities only three years after the adoption of the draft articles on prevention. Although limited in scope, the draft principles could serve as a useful guide to States and contribute to resolving questions of compensation. As to the final form they should take on second reading, his delegation would prefer a non-binding text, such as a declaration, guide or model law, and would present written comments on the issue in due course.

11. **Mr. Dinescu** (Romania) said that his delegation welcomed the 19 draft articles on diplomatic protection adopted by the Commission on first reading and found the commentaries clear and useful. Draft articles 17 and 18 might perhaps be merged, since the actions or procedures referred to in draft article 17 included those available under human rights treaties as well as investment treaties. Perhaps, too, there was no need for a special provision on ships' crews, as in draft article 19. Although his delegation shared the view that the right of the State of nationality of a ship's crew to exercise diplomatic protection on their behalf was different from and coexisted with the right of the flag State to seek redress for members of the crew irrespective of their nationality, it was inclined to believe that the situation was sufficiently covered by draft article 17. There was no need for the articles to recognize that right of the flag State explicitly, because it fell outside the scope of diplomatic protection.

12. Romania supported the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission on first reading. Based on a pragmatic approach, they offered the possibility of establishing an effective mechanism to ensure that victims received

compensation. His delegation was pleased with the broad scope of draft principle 2 and supported the inclusion of loss or damage by impairment of the environment in the definition of damage. Striking the right balance between economic growth and environmental protection was a current concern of many, and the issue was even more complex in a transboundary context. Romania, for example, was concerned about preservation of the natural habitat in the Danube delta in the light of efforts to build a navigable canal on the Bystroe and Chilia branches. With regard to the final form of the instrument to be adopted, his delegation shared the view that the text on liability should be combined in one instrument with the text on prevention. Although it did not exclude the possibility of a "soft law" approach, Romania would prefer the conclusion of a more effective instrument to ensure an adequate enforcement mechanism.

13. With regard to other decisions and conclusions of the Commission, his delegation fully endorsed the Commission's comments on the importance of summary records as an essential part of its work and of the Yearbook of the International Law Commission and its views on honoraria. It supported the inclusion in the current programme of work of the new topics "Expulsion of aliens" and "Effects of armed conflicts on treaties", but had doubts regarding the inclusion of the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" in the long-term programme of work. Although there was a developing practice of including the obligation in many international treaties, especially those relating to terrorism and crime, his delegation saw no immediate practical usefulness or relevance in the study of the principle. However, it could go along with the Commission's decision.

14. **Ms. Odaba-Mosoti** (Kenya), after commending the progress made on the topic of diplomatic protection during the Commission's fifty-sixth session, with the adoption on first reading of the draft articles, said that her Government would, after consulting the relevant agencies and experts, make written submissions to the Commission in due course. Meanwhile, it agreed with the general thrust of the draft articles. The principle that a State should be held accountable for injury caused to aliens by its wrongful acts or omissions, and the concomitant right of a State to exercise diplomatic protection in respect of its nationals, were long established in international law. The Commission's efforts to define the parameters within which the principle should operate, in order to avoid inconsistencies in its application by States, were therefore commendable.

15. The application of the nationality principle raised a number of difficult questions. For instance, in the case of dual or multiple nationality, the possibility of competing claims from different States directed at a third State in respect of the same person could not be ruled out. Although paragraph (4) of the commentary to draft article 6, discussed the possibility of joint claims, it failed to offer direction in respect of separate or successive claims. The matter deserved further attention; it should not be relegated to the realm of the general principles of law, since that would lead to the uneven application of standards. The Commission should undertake further work on elaborating rules to govern such situations. For example, the possibility of applying principles such as *res judicata* could be explored. Another possibility would be to establish an order of preference based on the dominant nationality principle.

16. With regard to the question of "nationality shopping", raised in the commentary to draft article 5, her delegation concurred with the Commission's view that the traditional continuous nationality rule should be retained to safeguard against nationality shopping. The exception contained in paragraph 2 of the draft article presented some difficulties, however. Since a State's right to exercise diplomatic protection derived from an injury to a national, it would be difficult to divorce the time of the injury from the time of the presentation of the claim. If an injured person changed nationalities in the intervening period, then clearly the new State of nationality had no *locus standi*, since it had had no duty to protect the injured person at the time of the injury. Moreover, the additional threshold requiring that there should be no nexus between the claim and the change of nationality was not easily enforceable, especially in cases of involuntary change of nationality. Her delegation would therefore favour the deletion of paragraph 2, leaving paragraph 3 as the only exception to the continuous nationality rule.

17. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, she said that, although still very broadly worded, the draft principles provided a solid basis for the development of an effective compensatory regime that would complement existing sectoral regimes in respect of transboundary harm.

18. The innocent victims of transboundary harm must be promptly and adequately compensated for damage to their persons or property or the environment. While supporting the thinking behind the draft principles, therefore, her delegation was nevertheless concerned about a number of points. First, given that the "polluter pays" principle and the "precautionary approach" elaborated in the Rio Declaration on Environment and Development and other environmental instruments were central to environmental damage compensatory regimes, the Commission should give greater emphasis to such principles in its future consideration of the topic. Secondly, the parameters of the obligation imposed on States under draft principle 4, paragraph 5, were not very clear. The Commission rightly imposed the primary responsibility on the operator. In her delegation's view, however, the State's responsibility should be limited to ensuring that operators within its jurisdiction complied with their obligations, especially with regard to establishing adequate compensation mechanisms. Paragraph 5 of the draft principle, obliging States to ensure the allocation of additional financial resources, went beyond the secondary duty of States to ensure compliance. The statement in paragraph (6) of the commentary that States were not obliged to set up government funds to supplement shortfalls by operators should, in the interests of clarity, be incorporated into paragraph 5.

19. *Mr. Simon (Hungary), Vice-Chairman, took the Chair.*

20. **Mr. Ayua** (Nigeria) said that the International Law Commission continued to play a pivotal role in furthering the codification and progressive development of international law, amplifying and cataloguing matters referred to it by the General Assembly as well as attending to matters of overall interest to Member States. It was one of the pillars upon which the United Nations system rested.

21. His Government was critically reviewing the draft articles on diplomatic protection and would submit written comments in due course. Meanwhile, it largely agreed with the Commission that a State should protect and obtain reparation for its nationals injured by the internationally wrongful act of another State, after all local remedies had been exhausted. It also supported draft article 8, which gave States the right to extend diplomatic protection to stateless persons and refugees under clearly stipulated conditions. As for injury to a corporation, the exercise of diplomatic protection should, as stated in the *Barcelona Traction* case, rest primarily with the State of incorporation. Foreign investments should, however, be adequately guaranteed, taking into consideration the concerns both of the corporate investor and the shareholders, regardless of their nationalities. In that context, Nigeria had put in place an investment regime to protect foreign investors, while ensuring the delivery of services, thus ensuring the stable development of the country's economy. The national institutions established to facilitate those objectives included the Nigerian Investment Promotion Commission, the Nigeria Export Promotion Council and the Nigeria Export Processing Zones Authority. Meanwhile, corruption had been addressed through the establishment of such bodies as the Independent Corrupt Practices and Other Related Offences Commission, the Economic and Financial Crimes Commission and the Due Process Mechanism.

22. With regard to the draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities, Nigeria lived with the painful memory of the dumping in 1988 of 40 to 50 tonnes of radioactive industrial waste in the port of Koko. The waste had afflicted the population and the environment, although it remained difficult to assess the full impact of the tragedy. The Government had had difficulty in dealing with the problem at the time, owing to the absence of an appropriate international legal instrument. It therefore commended the Commission's efforts to tackle the problem and the consistent attention paid to the challenges associated with the definition and interpretation of such terms as "prevention", "liability", "compensation" and "allocation of loss".

23. Remarkable progress had been made with completion of the first reading of the draft principles on the allocation of loss, although the Commission's work would be facilitated by a rigorous analysis of liability as understood under various regimes. A number of international and domestic instruments referred to "significant", "serious" or "substantial" damage as the threshold for giving rise to a legal claim, but the concept should be further examined. After all, what was not considered significant damage in one country could have enormously significant economic, social, political or security costs elsewhere. The need for a more elaborate, while concise, definition of significant damage could not be overemphasized.

24. His delegation endorsed draft principle 7, which encouraged the development of specific international regimes covering the areas of prevention, response measures and compensation. Furthermore, studies to determine the extent to which recent environmental disasters had been the result of negligence or of violations of rules in those areas were urgently needed. The dumping of hazardous wastes constituted one of the most serious economic, social and security threats to the world, and particularly to the developing countries.

25. His delegation welcomed the two topics added to the Commission's programme of work, namely "Effects of armed conflicts on treaties" and "Expulsion of aliens", which were relevant and timely. With the increasing number of armed conflicts at the national and international levels, the interrelatedness of the two topics was clear. His delegation also noted with appreciation the Commission's continued cooperation with other bodies, including the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization and the European Committee on Legal Cooperation. Such collaborative efforts no doubt enriched the Commission's deliberations. The Geneva International Law Seminar, which offered an opportunity for young lawyers from all parts of the world to familiarize themselves with the Commission's work, was also commendable and he urged States to contribute additional funds in support of the project.

26. *Mr. Bennouna (Morocco) resumed the Chair.*

27. **Mr. Prandler** (Hungary) said that the Commission had enjoyed an extremely productive session, having completed the first reading of texts on two important and difficult topics, as well as making progress on others. The draft articles on the complex and sensitive topic of diplomatic protection would be scrutinized by the relevant Hungarian authorities and written comments would be submitted in due course.

28. With regard to the inclusion of two new topics in the Commission's programme of work, his delegation shared the concern expressed by others that the report did not convincingly explain the need for the additions. The topic "Expulsion of aliens", in particular, should rather be taken up by other institutions of the United Nations system, such as the United Nations High Commissioner for Refugees or the Commission on Human Rights.

29. His delegation noted with sympathy that the Commission regarded its summary records as the equivalent of *travaux préparatoires*. Paragraph 367 of the report, however, gave no details of the other possibilities proposed by the Secretariat and his delegation would welcome clarification.

30. With regard to the topic of international liability in the case of loss from transboundary harm arising out of hazardous activities, his delegation considered that the content of the eight draft principles represented a significant step forward. Draft principle 4, in particular, with its imposition of certain requirements on States, touched on the vital interests of his country. Owing to its geographical situation, Hungary was extremely vulnerable to transboundary harm. One egregious example had been the extensive cyanide pollution by a friendly neighbouring country of Hungary's second biggest river. Despite all efforts to negotiate an out-of-court settlement and the initiation of legal proceedings, not a penny of compensation had been received thus far by the victims, whether individuals or legal entities. He did not wish to overdramatize the situation, however. There had also been promising bilateral and multilateral cooperation with neighbouring countries.

31. While his delegation endorsed the basic content of the draft principles, it did not favour the term "principles", for two reasons. First, principles usually applied to general rules, but the term made little sense in relation to such provisions as the "Scope of application" or "Use of terms". Secondly, following the Commission's adoption in 2001 of a draft preamble and 19 draft articles on the topic, General Assembly resolution 56/82 had requested it to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability. The Commission should therefore not restrict itself to principles but should elaborate a set of draft articles on liability. Indeed, the Commission itself stated, in a footnote to paragraph 175 of the report, that it reserved the right to reconsider the final form of the instrument in the light of comments by Governments. His delegation was pleased to note that other delegations, including those of Austria, Greece, the Netherlands, New Zealand, Portugal and Slovenia, had expressed similar reservations about the use of the word "principles".

The meeting rose at 3.55 p.m.

United Nations

A/C.6/59/SR.21

General Assembly

Fifty-ninth session

Official Records

Distr.: General
18 November 2004

Original: English

Sixth Committee

Summary record of the 21st meeting
Held at Headquarters, New York, on Friday, 5 November 2004, at 9.30 a.m.

Chairman:	Mr. Diaz Paniagua (Vice Chairman)	(Costa Rica)
later:	Mr. Bennouna (Chairman)	(Morocco)

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Statement by the President of the International Court of Justice

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In the absence of Mr. Bennouna (Morocco), Mr Diaz Paniagua (Costa Rica), Vice-Chairman, took the Chair.

The meeting was called to order at 9.40 a.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/50/10)

1. **Mr. Melescanu** (Chairman of the International Law Commission), introducing chapters V and VI of the Commission's report (A/59/10), said that chapter V, dealing with the responsibility of international organizations, contained four draft articles on the attribution of conduct to international organizations, which was one of the conditions determining the existence of an internationally wrongful act on the part of such an organization.

2. In that context, it had been noted that the same conduct might be attributable to a State and an international organization, or to two or more international organizations. Articles 4 to 7 were similar in many respects to the corresponding draft articles on responsibility of States for internationally wrongful acts in that they concerned the attribution of conduct, not the attribution of responsibility, and set out only positive criteria of attribution. The implication of those articles was therefore that the conduct of military forces of States or international organizations was not attributable to the United Nations when the Security Council authorized States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations. The draft articles did not cover conduct which had taken place in the absence or default of the official authorities, or the conduct of an insurrectional or other movement, but it was understood that if such an issue were to arise with respect to an international organization, the pertinent rules for States set forth in articles 9 and 10 of the draft articles on responsibility of States for internationally wrongful acts would apply by analogy to that organization.

3. The essential criterion in article 4, paragraph 1, namely that the organ or agent must be acting in the performance of functions conferred by the organization in question, reflected the jurisprudence of the International Court of Justice. The provision did not, however, specify different types of function, since they could offer substantially from one international organization to another. The term "governmental authority" had likewise been eschewed as being inappropriate in that context. When persons or entities were characterized as organs by the rules of their organization, their conduct was plainly attributable to the organization, but it had been considered useful to define the term "agents" for the purpose of attribution. That definition had been based on the advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*. The criterion contained in paragraph 3, which stated that the rules of the organization should apply to the determination of the functions of its organs and agents, was not intended to constitute a hard and fast rule and, in exceptional circumstances, it might be possible to hold that functions had been given to an agent or organ, even if that could not be said to be based on the rules of the organization.

4. Paragraph 4, containing a definition of the rules of the organization, was largely modelled on the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the one substantive difference being that the definition in the draft article was intended to cover more comprehensively the wide variety of functions performed by international organizations. For the purpose of article 4, the decisions, resolutions and other acts of the organization were relevant, whether they were binding or not, if they gave functions to organs or agents in accordance with the constituent instrument of the organization. The provision was intended to lend considerable weight to the practice of an organization. Since the definitions contained in article 4 had far-reaching implications, the Commission might decide, at a later stage, to move them to article 2.

5. The approach adopted in article 5 relating to the conduct of organs or agents placed at the disposal of an international organization by a State or another international organization was similar to that of article 6 of the draft articles on State responsibility and reflected the practice of international organizations, particularly that of the United Nations with respect to peacekeeping forces. The operative criterion for the attribution of conduct in that case was the exercise of effective control over the specific conduct of the organ or agent.

6. Article 6 referred to cases in which an organ or agent exceeded its authority or contravened instructions. It also covered instances in which the

conduct in question likewise exceeded the competence of the organization. It closely resembled article 7 of the draft articles on State responsibility and was intended to convey the need for a close link between ultra vires conduct and the functions of the organ or agent. Because it was necessary to protect third parties, the article in question concerned only the question of attribution and did not prejudge the validity of the act under the rules of the organization, or the responsibility of the international organization for valid or invalid acts.

7. Article 7 on conduct acknowledged and adopted by an international organization as its own indicated that the attribution of such conduct was based on the attitude of the organization and mirrored article 11 of the draft articles on responsibility of States.

8. In his third report, the Special Rapporteur intended to investigate breach of an international obligation, circumstances precluding wrongfulness and responsibility of an international organization in connection with the wrongful act of a State or another organization. It would therefore be useful if Governments were to express their views on the extent to which the Commission, when studying the responsibility of international organizations under international law, should consider breaches of obligations that an international organization might have towards its member States or agents. The Commission also wished to know if "necessity" could be invoked by an international organization as a circumstance precluding wrongfulness in circumstances similar to those referred to in article 25 of the draft articles on State responsibility. Governments' comments would further be appreciated on the question whether an international organization would be regarded as responsible under international law if a Member State's conduct in compliance with a request from the organization appeared to be in breach of an international obligation of both the State and the organization. Would the answer be the same if the State's wrongful conduct had not been requested, but only authorized by the organization? The Commission had circulated its annual report to some international organizations with a view to likewise obtaining their views on those matters.

9. Turning to chapter VI, he said that work on the topic "Shared natural resources" was still in its preliminary stages, and the Commission would therefore welcome detailed and precise information from Governments about bilateral or regional practice relating to the allocation of groundwaters from transboundary aquifer systems and to the management of non-renewable transboundary aquifer systems. It would also be helpful if States were to give due consideration and respond to a questionnaire in which the Special Rapporteur had requested their views on transboundary groundwaters.

10. In his second report, the Special Rapporteur had proposed a general framework and a set of six draft articles. The proposed general framework comprised seven parts and was based largely on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, although it had been acknowledged that the principles of that Convention could not be applied mutatis mutandis to groundwaters. The six draft articles, which were to be contained in parts I and II of the general framework entitled respectively "Introduction" and "General principles", were to be found in footnotes 323 to 328 to the Commission's report.

11. No decision had been taken about the final form of the draft articles and diverging views had been expressed as to whether preference should be given to a framework convention, a model law, or guidelines to assist States in drafting bilateral and regional agreements other than conventions. The Special Rapporteur had therefore proposed draft articles in order to elicit specific comments, encourage an informed debate and identify additional areas requiring examination. Consequently, the draft articles had not yet been referred to the Drafting Committee of the Commission.

12. The Special Rapporteur's report had introduced several new elements. Owing to the sensitive nature of the term "shared", the Special Rapporteur had suggested that it should be replaced by "transboundary" and that it would be scientifically more precise to refer to "aquifer" and "aquifer system", rather than "groundwaters". The term "confined groundwaters" had been dropped, since, for groundwater experts, the word "confined" had a meaning different from that employed in the Convention on the Law of the Non-navigational Uses of International Watercourses. It had also been felt that the use of that term would unduly limit the scope of the topic by excluding some extremely important aquifers from the ambit of the draft articles. In addition, the Special Rapporteur had proposed that activities other

than the use of transboundary groundwaters should be regulated in order to protect those waters from pollution caused by surface activities. The general framework might be subject to further revision, because the subject-matter was highly specialized and State practice in that area was scarce. While the terminological changes proposed by the Special Rapporteur had received general support, some of the terms used required more precise definition. The relationship between the Convention on the Law of the Non-navigational Uses of International Watercourses and the study of groundwaters required further clarification and might form the subject of a draft article. Caution was, however, required in respect of reliance on that Convention, which had not yet entered into force, and on the draft articles on the prevention of transboundary harm from hazardous activities, which had still to be adopted by the General Assembly. While some members wished to place more emphasis on the primary role of the State in deciding on the appropriate use of groundwater resources, others had stressed the role of regional arrangements. A number of members had, however, taken the view that the Commission's work would be complementary to national and regional approaches.

13. Although some of the principles incorporated in the Convention on the Law of the Non-navigational Uses of International Watercourses were equally applicable to groundwaters, some modifications might be required in order to cater for the special characteristics of groundwaters. Great care might be required in respect of the principles of equitable use and reasonable utilization and it might be necessary to include principles concerning environmental protection, the sustainable use of aquifers and the protection of vital human needs. Some doubts had been voiced about the threshold of "significant harm" in connection with the obligation not to cause harm, since groundwater resources were more vulnerable than surface waters. It had also been suggested that the principles of inter-generational equity and respect for environmental integrity should be borne in mind.

14. Mr. Lammers (Netherlands) said that international regulation of the uses of and factors impacting on shared natural resources was of the greatest significance to his country. His Government was therefore concerned about the Commission's narrow treatment of the topic. Although it had been acknowledged that migratory species and all mineral deposits not within the jurisdiction of a single State were subsumed within the concept of shared natural resources, the Commission had from the outset limited its examination of the subject to groundwater, oil and gas and thus far the debate had been confined to groundwaters, or more specifically to aquifers, i.e. permeable water-bearing rock formations capable of yielding exploitable quantities of water. If that concept did not include sand and gravel, it would be necessary to consider what rules or principles of international law governed transboundary groundwater systems which were not aquifers.

15. Speaking on behalf of the European Union, he said that when the Commission studied the possibility of adapting the draft articles on State responsibility for internationally wrongful acts to the responsibility of international organizations, it should remember the diverse nature of those organizations, a diversity to which the European Union and the European Community bore testimony.

16. Mr. Kuijper (Observer for the European Commission) said that the European Community was an international organization with special features. Under its founding treaties, member States had transferred some of their competences to the organization, but the European Community was far from being a State; it relied on the authorities of its member States to apply and enforce its acts and regulations. The specific character of the European Community should be taken into account in the Commission's draft articles on responsibility of international organizations.

17. According to draft article 3, paragraph 2, as provisionally adopted, there was an internationally wrongful act of an international organization, entailing the international responsibility of that organization, when conduct was attributable to the international organization and constituted a breach of an international obligation of that organization. The normal situation envisaged by the draft article, therefore, was that conduct could be attributed to the organization that was the bearer of the obligation. However, there could be cases in which the European Community could be considered responsible for the infringement of international obligations because of the conduct of member States. The European Community was a party to many treaties and the bearer of many international obligations. If, for example, the Community had agreed to a certain tariff treatment

with third States, the agreement might be breached by customs authorities of member States charged with implementing Community law. In short, there was a separation between responsibility and attribution of conduct.

18. The special situation of the European Community and other potentially similar organizations could be accommodated in the draft articles by special rules of attribution of conduct, so that the actions of organs of member States could be attributed to the organization, by special rules of responsibility, so that responsibility could be attributed to the organization, even if organs of member States were the prime actors of a breach of an obligation borne by the organization, or by a special exception or saving clause for organizations such as the European Community. The Community would prefer to work towards one of the first two solutions and would be interested in hearing whether other international organizations had the same problems.

19. The definition of "rules of the Organization" in draft article 4, paragraph 4, could be improved by changing the words "established practice" to "generally accepted practice", with less stress on the time element, and by adding a reference, either in the text or in the commentary, to the general principles of law of the organization and to the case law of an organization's tribunal. Draft article 5 aptly summarized the relevant principles for attribution of conduct of organs or agents placed at the disposal of an international organization by a State or another international organization. It appeared from the commentary that the Commission was thinking primarily in terms of factual control, whereas it would be more relevant to the specific situation of the European Community to think in terms of effective legal control.

20. **Mr. Läufer** (Germany) said that his delegation fully agreed with the points raised by the Netherlands and the European Commission. The draft articles on responsibility of international organizations focused on the question of attribution of conduct, on the understanding that attribution might be dual or even multiple. However, the question remained as to the circumstances in which conduct attributed to the organization might entail the responsibility of its member States. With regard to draft article 4, his delegation commended the decision to give a broad definition of the term "agent" and to refer in the commentary to the definition of the International Court of Justice in its advisory opinion on *Reparations for injuries suffered in the service of the United Nations*. A broad definition was crucial in view of the variety of international organizations.

21. His delegation shared the Commission's view that the core criterion for the attribution of ultra vires conduct was the requirement that the organ or agent had acted in that capacity. Draft article 6 therefore excluded acts performed in a private capacity, thus safeguarding the requirement that there should be a close link between the attributable conduct and the functions of the organ or agent. In the case of organs or agents placed at the disposal of an international organization, attribution of conduct must be based on the criterion of effective or factual control, which his delegation considered one of the guiding principles of the entire concept of responsibility of international organizations. However, in its efforts to identify general rules on the attribution of conduct of organs or agents lent to an organization, it seemed that the Commission was placing too much emphasis on the special case of States contributing troops to United Nations peacekeeping operations.

22. His delegation supported the approach of resorting wherever possible to the solutions already found within the context of the responsibility of States, but was not convinced that the concept of necessity could be carried over to the responsibility of international organizations. Concerning the legal nature of the rules of the organization in relation to international law, the issue of possible breaches by the organization of its obligations towards its member States should be included only to the extent that it might affect the attribution of conduct or responsibility. As the Commission had requested, Germany would soon transmit a compilation of its State practice on the responsibility of international organizations.

23. On the topic "Shared natural resources", Germany expressly supported the aim of better protecting transboundary groundwaters through international cooperation and on the basis of regulations under international law. The question should be addressed as to how to achieve that goal as efficiently and flexibly as possible. Since preparing, negotiating and implementing a global convention on transboundary groundwaters appropriately in each region would presumably be a lengthy process, it would be useful to consider an approach in which different "building blocks" were formulated and

offered to meet the different regional or technical starting points. That approach, rather than a global convention, would make it possible to reach legally binding regulations more closely geared to specific regional problems and to achieve practical results more quickly and efficiently. The United Nations Environment Programme, given its experience with international legislation in the environmental sphere, could help the Commission in developing that approach.

24. *Mr. Bennouna (Morocco) took the Chair.*

25. **Mr. Kendall** (Argentina) said that his country, as a Guarani aquifer system State, had a special interest in the topic of shared natural resources and transboundary groundwaters. The concept of a "shared" natural resource in no way implied that the resource in question constituted a shared heritage of mankind or was subject to shared ownership. It meant that the resource was subject to shared management by the countries to which it exclusively belonged, i.e., the States in which it was situated and, specifically in the case of groundwaters, the States in which aquifers were situated. Argentina believed that in the commentary and, perhaps, the preamble to the draft articles, explicit reference should be made to ownership by the States in which the resource was situated, without any specific norm recognizing such attribution being required, particularly since ownership was not an issue that required special normative treatment. It was possible to treat groundwaters in a similar manner to petroleum and gas with regard to their ownership, but not with regard to their use, management, protection and preservation.

26. There was therefore no need to change the current title of the topic, i.e. "Shared natural resources". Argentina agreed that the sub-topic should be entitled "Transboundary groundwaters", and that the terms "aquifer" and "aquifer system" should be used. The question of the link between an aquifer system and domestic watercourses and recharge and discharge areas should be studied. Non-transboundary aquifers were outside the scope of the topic and there was no need to define the term "groundwaters".

27. Argentina believed that the customary norms established under the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses offered a basis for the elaboration of a groundwater regime. The norms relative to liability deserved special and separate mention. The principles applicable to surface waters could be applied to groundwaters, provided they were expanded and adapted to the specific characteristics of the latter. The Commission should first define the general principles applicable to all groundwaters. It should develop the principles governing surface waters that could be adapted to groundwaters, and also develop specific principles for certain types of aquifers, such as those not hydrologically linked to surface waters. Argentina agreed with the Special Rapporteur that recharge and discharge areas should also be regulated in order to ensure proper aquifer management. The principles of equitable use and reasonable utilization could appropriately be applied to water resources and should be taken into account by the Commission, taking into account the particular characteristics of groundwater resources.

28. His delegation considered the treatment of liability in draft article 4, paragraph 4, to be unacceptable, and agreed that work on the articles concerning prevention of transboundary harm resulting from hazardous activities should proceed with caution.

29. Irrespective of the form in which the norms were finally adopted, they must be directed at the States in which the resources were situated since those were the States that had a duty to apply and develop them in their mutual relations through regional and subregional agreements.

30. It would be imprudent to say, as the Special Rapporteur had done, that the Guarani aquifer system "practically" did not receive recharge or that it was not connected with surface waters, especially since studies were being conducted to provide further information and better understanding of the system's features, including its recharging areas. The Special Rapporteur's analysis should be confined to the technical data provided by the States in which the transboundary resources were located, particularly in view of the current four-year project for the environmental protection and integrated sustainable management of the Guarani aquifer. In addition to the technical work undertaken within the framework of that project, the Southern Common Market (MERCOSUR) Council had set up an ad hoc high-level working group on the Guarani aquifer to draw up a draft agreement among the MERCOSUR member States which would establish the principles and criteria for safeguarding the rights of those States over their

groundwater resources. The draft agreement might also include conditions and guidelines for the management and monitoring of the Guarani aquifer.

31. Argentina believed it would be useful for the Guarani aquifer system States to provide the Commission with information on the system. It should also be noted that the norms to be considered by the Commission were those emerging from international practice, since non-governmental bodies such as the International Law Association did not formulate norms.

32. **Mr. Ferrari-Bravo** (Italy), referring to chapter V of the Commission's report said that the rules adopted by the Commission had taken into consideration the importance of the factual element in the attribution of conduct to an international organization, especially in the case of an organ placed at the disposal of an international organization by a State, or another international organization. Italy agreed with the approach taken by the Commission whereby it refrained from formulating exceptions to the rules on the attribution of conduct to a State, as adopted on second reading in 2001. The conduct of an organ of a State should remain attributable to that State even if such conduct had taken place on the basis of a decision by an international organization of which the State was a member. The question remained as to what extent the international organization was responsible in such a situation. The answer might be found by analysing the factual circumstances that would make it possible to establish the extent to which the organization had contributed to the conduct of the State. If the State was not bound by the international obligation in question, the international organization would be the only party deemed responsible.

33. The issue of the subsidiary responsibility of member States in the case of responsibility of an international organization, raised by the Commission with commentary to draft article 1, should be examined within the framework of exceptions to the rule set out in draft article 3, in which responsibility did not presuppose attribution. It was not certain whether a uniform solution, applicable to all international organizations, could be found.

34. Turning to the topic "Shared natural resources", he welcomed the efforts made by the Commission and the Special Rapporteur to collect all the necessary relevant scientific and technical data. It would be useful to establish some specific obligations, given the vulnerability of aquifers to pollution and excessive exploitation, and his delegation hoped that such obligations would be dealt with in future draft articles. Insofar as groundwaters fell within the scope of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, it would be desirable to ensure compatibility between that Convention and the new instrument envisaged, perhaps through the elaboration of a draft protocol additional to the Convention.

35. **Mr. Romeiro** (Brazil), referring to the topic "Shared natural resources", said that the increased participation of countries in discussions on the topic revealed a growing interest in it and the readiness of many States to assist the Commission in its work on that complex issue.

36. Brazil welcomed the focus on transboundary groundwaters, and agreed that a step-by-step approach should be pursued. States bore the primary responsibility for the management of their groundwater resources, but although that responsibility took precedence over their commitments at the international level, the two principles were not incompatible. Thus, in the management of transboundary resources, regional approaches played an important role in reconciling national interests and international concerns. In addition to regulating accessibility to those resources, regional commitments reaffirmed fundamental principles such as the obligation not to cause harm and the strengthening of cooperation practices.

37. Referring to the ad hoc high-level group established to set up a legal framework to regulate the principles, rights and duties of Guarani aquifer system States, he took the opportunity to reaffirm the MERCOSUR member States' belief that groundwaters belonged to the territorial domain of the States under whose soil they were located and that the Guarani aquifer system was located in the area comprising MERCOSUR countries. Water resources belonged to the States in which they were located and were subject exclusively to the sovereignty of those States. In that regard, it was important to reiterate the principle of sovereignty regarding the use of transboundary resources contained in General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources.

38. Mr. JIA Guide (China), referring to chapter V of the Commission's report, said that his delegation could support the four draft articles on the attribution of conduct to international organizations. Article 4, paragraph 1, was of particular importance as it established the general rule on attribution of such conduct. The definition of "rules of the organization" was acceptable, but the reference to "established practice" was somewhat unclear. The designation of a specific practice of an international organization as an "established" practice depended not only on the organization itself, but also on the attitude of the respondent State. In practice, States might not always have an opportunity to state their position on whether a specific act of an organization constituted an established practice. It would therefore be advisable to take a cautious, case-by-case approach to the question.

39. The "effective control" criterion established in draft article 5 was an appropriate way of addressing the question of attribution of "conduct of organs or agents placed at the disposal of an international organization by a State or another international organization". The degree of attribution depended on the degree of effective control. It must be borne in mind, however, that the "effective control" criterion was an evolving rule, with some supporting evidence but without a common understanding on what type of control constituted "effective" control.

40. With regard to the commentaries, draft articles 4 to 7 dealt with attribution of conduct, and there was therefore no need to deal with attribution of responsibility, as was done in paragraph 3 of the commentary in paragraph 72 of the report.

41. Turning to the first of the specific issues relating to the topic "Responsibility of international organizations" raised by the Commission in paragraph 25 (a) of the report, he said that breaches of obligations that an international organization might have towards its member States or its agents fell within the purview of the topic and should be studied by the Commission. Such a study could be undertaken from the perspective of conduct in breach of international obligations, which was a premise for responsibility of an international organization. The study would thus address the legal nature of rules governing relationships between international organizations and their members or agents, including rules of international organizations, with a view to ascertaining what relationships were regulated by international law and which rules could be considered as international law. In general, only relationships regulated by international law could involve breaches of international obligations.

42. As for the second special issue, (para. 25 (b) of the report) namely whether necessity could be invoked by an international organization to preclude wrongfulness, his delegation believed that it could not. While States were entitled to invoke necessity to safeguard their essential interests, it would be inappropriate for an international organization to do so. Naturally, necessity could be invoked for reasons other than the protection of essential interests and thereby become a pretext for non-compliance with international obligations or for infringement of the rights of another State. However, the commentaries to the draft articles on responsibility of States for internationally wrongful acts showed clearly that the draft proposed strict restrictions on the application of the necessity criterion. When drafting those articles, the Commission had been aware of the danger posed by abuse of the criterion. An international organization could perfectly well safeguard its essential interests pursuant to international law.

43. With regard to the specific issues, set out in paragraph 25 (c) of the report, he believed that they could be addressed by using the criterion of effective control, in the sense of "legal" control. If a member State were obligated, pursuant to a resolution of an international organization, to take a certain course of action in breach of international law, then in principle both the organization and the State should bear international responsibility. The degree of their respective responsibility would depend on the degree of legal control exerted. In the case of action taken by a member State at the request of an organization and in breach of international law, the requesting organization bore a relatively higher responsibility due to its generally greater degree of legal control. On the other hand, in the case of State conduct which was in breach of international law and only authorized by an organization, the responsibility of the authorizing organization would be lighter, given the relatively wide latitude the authorized State possessed to determine what action, if any, to take.

44. Turning to the topic "Shared natural resources", he said that China in principle supported the framework and draft articles presented by the Special Rapporteur. It agreed that the word "shared" should be dropped from the title of the topic, and that the term

"confined transboundary groundwaters" should be replaced with "transboundary aquifer systems".

45. With respect to the relationship between the proposed draft articles and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, he said that since transboundary aquifer systems could be connected to surface waters, the question of the relationship between the two instruments did arise. The issue could be resolved by the legal device of including specific provisions in the draft articles, or by limiting the scope of the study mainly to "confined underground aquifer systems", with the understanding that "aquifer systems" could be linked to surface waters, but that such a link would be weak and negligible. Furthermore, China shared the view that the basic principles embodied in the 1997 Convention could not be automatically transposed to cover transboundary aquifer systems. The Commission might also wish to consider including in the draft articles the principle of sovereignty of States over their natural resources.

46. As to the question whether the term "significant harm" should be used in draft article 4, he considered that the concept was applicable in that context. What constituted "significant harm" should be judged on case-by-case basis. China believed the term "harm" in that context meant harm caused to other States, and considered that the rights and obligations of States relating to activities that might affect transboundary aquifer systems should be emphasized to give prominence to the status of States, without prejudice to the use of resources by specific individuals and groups, which should be governed by domestic measures taken by the State concerned.

47. The issue of liability, in relation to the "question of compensation" mentioned in draft article 4, paragraph 4, could be dealt with in connection with the topic "International liability for injurious consequences arising out of acts not prohibited by international law". There was no need to over-regulate liability under the current topic unless harm resulted from a violation of international law. With regard to the final form of the proposals, that question could be decided after progress had been achieved on substantive matters.

48. **Mr. Paolillo** (Uruguay) said that the issue of transboundary aquifer systems was of particular interest to his delegation, since part of the Guaraní aquifer was located in Uruguayan territory. Despite the lack of practical experience with regard to that issue, the Special Rapporteur had produced an excellent report. Although the Special Rapporteur had made no recommendation concerning the final form of the Committee's conclusions, his delegation would prefer that the Committee make recommendations or establish guidelines which States could take into account when entering into bilateral or regional treaties for the preservation and use of shared aquifers. Such a solution was preferable because of the lack of practical experience in that area, but above all because of the widely varying characteristics of transboundary aquifer systems; standards for their preservation and use must therefore be established taking those differences into account. He agreed with the Special Rapporteur that universal standards which might be established by the Committee could provide a model for regional agreements.

49. The Guaraní aquifer, for example, was one of the largest underground reserves of water in the world, yet its capacity for renewal was insignificant compared to its total volume and potential uses. That fact required great prudence when establishing the principles for its management. Comprehensive studies of the Guaraní aquifer were under way with a view to ensuring that the members of the Southern Common Market (MERCOSUR) adopted appropriate regulations for that purpose. Studies on aspects such as environmental protection and the sustainable development of the aquifer had been undertaken with international financial support.

50. At the judicial level, and at the initiative of his Government, the MERCOSUR countries were working to establish fundamental principles on which to base future regulations and measures relating to the preservation and use of the aquifer. A panel of legal experts had been established with a view to drafting a basic text which would shortly be submitted to the Governments concerned. The negotiations were based on three principles: the portion of the Guaraní aquifer lying in the territory of each country was under its sovereignty and, without prejudice to any cooperation efforts, each member State of MERCOSUR was solely responsible for the management of that portion of the aquifer located in its territory; preservation of the aquifer with a view to its rational and sustainable use; and respect by each State of the obligation to cause no significant harm to the other States. In that context, he said that although the 1997 Convention on the Law of

the Non-Navigational Uses of International Watercourses was not directly applicable to the management of a transboundary aquifer system, many of its principles were applicable or could be adapted for that purpose and that Convention should therefore be taken into account by the Commission.

51. The draft articles prepared by the Special Rapporteur provided a good starting point but required further clarification, in particular with regard to their scope of application. He expressed concern that there was some ambiguity in the definitions of the terms used; for example, in draft article 2 (a) reference should be made to the water contained in the aquifer rather than limiting the definition to "water-bearing rock formation". Furthermore, the much-discussed notion of "exploitable" should perhaps be replaced by the notion of usable, which was a more objective criterion; accordingly, in draft article 1 the term "uses" should be retained and not be replaced by "exploitation", as had been suggested during the Commission's discussions.

52. In addition, in draft article 4, paragraph 3, the word "impair" should be replaced by the word "alter", which would be a clearer and more objective criterion. With regard to paragraph 4 of the same article, the use of the words "significant harm" should be carefully studied. Although the reasons given by the Special Rapporteur for using that language were quite convincing, given the extreme vulnerability of the resource, which was not always renewable, the Commission should perhaps consider whether it would be appropriate to use language which implied something less than "significant harm".

53. **Mr. Currie** (Canada) said the framework for formulating draft articles on transboundary aquifer systems proposed by the Special Rapporteur, emphasizing the protection of aquifers, bilateral cooperation and sharing of information and data was an important step forward. Reliance on the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses as a framework for a new convention dealing with groundwaters should, however, be balanced with other approaches, especially since the 1997 Convention was not yet in force and still lacked considerable international support; exploration of other approaches could contribute to a consensus on the new draft articles. He also cautioned that the provisions of the current framework that would allocate water resources located in aquifers between States on the basis of similar provisions in the 1997 Convention might prove controversial.

54. The Special Rapporteur himself had recognized that continued research and study on groundwaters were necessary to develop the draft articles further and, in that context, he said that his Government was preparing written comments in reply to the Commission's request for information on relevant State practice. As a preliminary comment on Canada's experience, he noted that existing Canada-United States bilateral instruments, such as the Boundary Waters Treaty, did not apply to groundwaters, although the International Joint Commission had conducted studies on groundwater issues.

55. **Mr. Tajima** (Japan), referring to the topic "Responsibility of international organizations", re-emphasized the difficulty of drafting guiding principles on the matter, given the diversity of such organizations with regard to their structure, legal status, activities and membership. That had been made clear during the Commission's discussion of the "rules of the organization" in the context of attribution of responsibility to international organizations. The examples referred to in draft article 4 (paragraph 4), such as constituent instruments, decisions and resolutions, although non-exhaustive, could help to identify the rules to be applied to a particular organization, yet the nature of each document differed from one organization to another and required a case-by-case analysis. Furthermore, the standard of "effective control" (draft article 5), used to determine the responsibility of the organization, required clarification; while a general criterion applicable to all kinds of international organizations would be desirable, he wondered how it would be applied in practice. Too vague a definition might bring the validity or effectiveness of the standard into question but too detailed a definition might make the standard impractical for across-the-board application.

56. He supported the approach adopted by the Special Rapporteur, namely that of following the basic structure of the draft articles on State responsibility and identifying any elements not applicable to the responsibility of international organizations. Although that might only serve to highlight the diversity of international organizations and the differences between them and States, it would certainly help in identifying areas which required further analysis. In that context, the question raised by the Commission regarding the

applicability of "necessity" in the context of internationally wrongful acts (A/59/10, para. 25 (b)) was a valid one and suggested that case studies might be useful in identifying when and whether international organizations might be justified in invoking such grounds.

57. As for the possible difference in the responsibility of organizations according to whether they "requested" or only "authorized" an action by a State, it was difficult to give a general answer; differences in the nature of the role played by the organization, and of any action taken by the State as a result, could influence the determination of the organization's responsibility. The Commission's work on that issue was still in its early stages and it remained to be seen whether the draft articles should remain quite general or whether there were areas where more specific drafting might be possible.

58. Turning to the topic of "shared natural resources", he said that, given the importance of groundwaters for the daily life of humanity, it was appropriate for the Commission to have chosen transboundary groundwaters as a starting point. The lack of State practice in that regard justified caution in establishing a legal framework and he welcomed the Special Rapporteur's efforts to obtain assistance from groundwater experts from international organizations. Avoidance of the use of the sensitive term "shared resources" would avert a complex debate over the common heritage of mankind or shared ownership.

59. The scope of the proposed convention should not be limited to groundwaters not covered by the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. Some of the aquifer systems covered by the latter had characteristics of groundwaters and should be governed by a new convention on that question; problems arising from dual applicability could be addressed in an appropriate provision in the new convention. The 1997 Convention did provide a base upon which to build a groundwater regime, but any new legal framework should take fully into account the unique characteristics of groundwaters. The current framework proposed by the Special Rapporteur was acceptable and the Special Rapporteur should continue preparing draft articles, leaving the issue of the final form of the legal framework to be decided at a later stage. He looked forward to the presentation of draft articles for all the remaining segments in 2005. Careful analysis of State practice and existing international agreements would be indispensable, in particular with regard to the use of aquifer systems.

Agenda item 162: Observer status for the South Asian Association for Regional Cooperation in the General Assembly (*continued*) (A/59/234 and A/C.6/59/L.21)

60. **The Chairman** said he took it that the Committee wished to adopt draft resolution A/C.6/59/L.21 without a vote.

61. *Draft resolution A/C.6/59/L.21 was adopted.*

Agenda item 142: Convention on jurisdictional immunities of States and their property (*continued*) (A/59/22 and A/C.6/59/L.16)

62. **Mr. Bühler** (Austria), introducing draft resolution A/C.6/59/L.16 on behalf of the Bureau, said that it represented the culmination of 27 years of work and reflected the will of the international community to regulate the jurisdictional immunities of States and their property in a uniform manner for the benefit of the development of economic relations between States on the one hand and private companies and other actors on the other. The draft resolution noted, inter alia, the need for uniformity and clarity in the law of jurisdictional immunities of States and their property (seventh preambular paragraph) and stated explicitly that the United Nations Convention on Jurisdictional Immunities of States and Their Property did not cover criminal proceedings (para. 2).

63. The text of the Convention was contained in the annex to the draft resolution. The date until which the Convention would be open for signature had been left blank (art. 28) and the date of the opening for signature (art. 33) had likewise been left blank in order to give the Secretariat enough time to prepare the text for signature. It was proposed to open the Convention for signature as of 17 January 2005 for a period of two years, until 17 January 2007, after which date the Convention would remain open for accession. If those dates met the approval of the Committee, the Secretariat would make the necessary changes in articles 28 and 33. He recommended that the draft resolution be adopted by the Committee without a vote.

64. **The Chairman** said the Secretariat would add the dates in question to articles 28 and 33 of the text of the

draft Convention to be issued in the report of the Committee.

Statement by the President of the International Court of Justice

65. **Mr. Shi Jiuyong** (President of the International Court of Justice) said that in the course of the year ending 31 July 2004, the International Court of Justice had held hearings relating to 12 cases, rendered three final judgements and delivered one advisory opinion, and it currently had 21 cases listed on its docket. The thriving contentious side of the Court's work demonstrated the confidence that States placed in it. However, he would like to draw attention to the Court's generally less known but nonetheless extremely important advisory function, which was underutilized but could be an extremely valuable tool for United Nations bodies.

66. The advisory function of the Court had its origins in Article 14 of the Covenant of the League of Nations concerning the establishment of the Permanent Court of International Justice. The Permanent Court had been authorized to give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly of the League of Nations, and its subsequent 27 advisory opinions over the course of two decades had greatly facilitated the work of the Council by offering a solid legal basis for the final settlement of international disputes. Although its advisory opinions had not been not binding in nature, they had invariably been given authoritative status by the organs and States concerned. Despite initial concerns that the advisory function might be incompatible with the judicial role, the Permanent Court had derived significant prestige from its advisory function and had made an exemplary contribution to the development of international law in the period between the two world wars.

67. With the establishment of the United Nations and the International Court of Justice as its principal judicial organ, the advisory competence had been widened in scope. According to Article 96 of the Charter, not only could the General Assembly and the Security Council request the Court to give an advisory opinion on any legal question, but the General Assembly could authorize other organs of the United Nations and specialized agencies to request advisory opinions on legal questions arising within the scope of their activities. Currently there were 20 such bodies. The Security Council had made use of its prerogative only once; nearly one third of all requests for advisory opinions had emanated from the General Assembly; and the Court had delivered nine advisory opinions at the request of other United Nations organs and specialized agencies. On one occasion, in the advisory opinion on *Legality of the use by a State of nuclear weapons in armed conflict*, the Court had decided that it lacked jurisdiction to reply to one such request submitted by the World Health Organization because the request did not relate to the scope of activities of that organization.

68. Article 65 of the Statute of the International Court of Justice had always been interpreted as conferring discretion upon the Court whether to give the opinion requested, but the Court, like its predecessor, had always considered that there must be compelling reasons for it to exercise its discretion not to render an advisory opinion. Concerns about the propriety of the Court's exercise of its advisory function arose when the subject matter of the request was connected with an actual dispute between States or a legal question actually pending between two or more States. While consent of the parties was required for contentious proceedings, it was not set out in Article 96 of the Charter as a condition for advisory jurisdiction. However, the Court had always held that it was obliged, even when giving advisory opinions, to respect the essential rules guiding its activities as a court of justice, including the principle that a State was not obliged to allow its disputes to be submitted to judicial settlement without its consent.

69. Nonetheless, the Court had never declined to give its opinion simply because there was some connection between a dispute involving States and the subject of the request. In a number of cases, the Court had construed the question before it as relating to the exercise of the functions of the requesting United Nations organ rather than to any ongoing dispute. In its most recent advisory opinion on *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, the Court had decided that its pronouncement would not have the effect of circumventing the principle of consent to judicial settlement, on the grounds that the question put by the General Assembly was far broader than the bilateral dispute and was of particularly acute concern to the United Nations.

70. When considering its advisory jurisdiction, the Court was subject to the requirement of Article 96 of the Charter that the question put to it should be a legal question. However, the fact that such a question might arise in a political context was not sufficient to deprive the Court of jurisdiction. In its famous dictum in its advisory opinion on *Western Sahara*, it had held that questions framed in terms of law and raising problems of international law were by their very nature susceptible of a reply based on law. The Court to date had never found that political arguments surrounding a legal question put to it constituted a compelling reason for it to decline to exercise its advisory jurisdiction.

71. Advisory opinions were non-binding: even the requesting body was not obliged to accept the Court's conclusions, although in fact both the Council of the League of Nations and the various agencies of the United Nations had always done so. States and other international entities were also entitled to agree among themselves that the opinion would be binding on them. Some treaties even stipulated that, in the event of a dispute, an advisory opinion of the Court would be considered decisive or binding. One such was the advisory opinion on the *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, in which the Court had distinguished between the advisory nature of the Court's task and the particular effects that parties to an existing dispute might wish to attribute, in their mutual relations, to an advisory opinion of the Court.

72. With that background, a pertinent question was why recourse to the Court's advisory function should be encouraged and how it might be developed. The advisory procedure enabled the Court to contribute to the overall objectives of the United Nations by playing a role in international dispute resolution and prevention and by clarifying and developing international law. Thus, for example, having asserted that the construction of the wall by Israel in the Occupied Palestinian Territory was contrary to international law, the Court had found that the United Nations, and especially the General Assembly and the Security Council, should consider what further action was required to bring the situation to an end, taking due account of the advisory opinion. Moreover, in the past, there had been instances in which States had found it more acceptable for an advisory opinion to be requested than for contentious proceedings to be instituted. Thus, in the *European Commission of the Danube* case, Romania had rejected the option of seeking adjudication via the contentious procedure but had agreed to the request for an advisory opinion as a compromise.

73. The advisory procedure could also play an indirect role in preventing disputes or conflicts from developing by clarifying the legal parameters within which a problem might be resolved. The case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* had dealt not only with an organizational issue and the depositary functions of the Secretary-General but also with a general problem of treaty law, namely the legal effect of reservations to a multilateral treaty and of the objections made by other parties. In its advisory opinion of 1971 on the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, the Court had interpreted Article 27 of the Charter of the United Nations. Moreover, advisory opinions enabled the Court to determine the current status of particular principles and rules of international law. Thus it had given its advisory opinion on Western Sahara in response to two questions put by the General Assembly regarding the legal status of that Territory. In the case concerning the *Legality of the threat or use of nuclear weapons*, the Court had noted that the international community was profoundly divided on the matter but it had stressed the applicability of the principles and rules of humanitarian law to a situation involving the possible use of nuclear weapons.

74. The Court's opinions had also been useful in establishing points of the law of international organizations, particularly since entities other than States could not have recourse to the Court's contentious jurisdiction. Thus, in the case concerning *Reparation for injuries suffered in the service of the United Nations*, the Court had stated that, in its view, the United Nations had been created as an entity possessing objective international personality and not merely personality recognized by its Members alone. That opinion had paved the way for the clarification of important aspects of the international legal personality of intergovernmental organizations. Other examples had included the case concerning *Judgements of the Administrative Tribunal of the International Labour Organization (ILO) upon complaints made against the United Nations Educational, Scientific and Cultural*

Organization (UNESCO), which had addressed the question of whether judgements by the ILO Administrative Tribunal were binding on UNESCO. Similarly, the case concerning the *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization* had been instrumental in reconstituting the Maritime Safety Committee of the organization that had later become the International Maritime Organization.

75. It was, perhaps, surprising that in 58 years the Court had been asked to give advisory opinions on only 24 occasions; comparatively speaking, that was far fewer than the Permanent Court of International Justice during its 17 years' existence. There was a feeling in some quarters that the procedure could be useful in addressing many more international problems. Without seeking to prejudge the question, he wished to put forward some of the possible ways in which that could be achieved.

76. Thought could be given to broadening the field of application of the Court's advisory jurisdiction *ratione personae*. In other words, given their growing importance, intergovernmental organizations could be authorized to request opinions directly. Since such a change might raise certain legal difficulties in relation to the interpretation of the Charter of the United Nations, it had been suggested that access to the advisory procedure might be given to a wider group of intergovernmental organizations, which could then ask for opinions using the General Assembly or the Security Council as an intermediary.

77. Another suggestion was to empower the Secretary-General to request advisory opinions on his own initiative. Currently, he could only place a question on the agenda of an organ and suggest that it should become the object of a request for an advisory opinion, as had indeed been the approach taken in 1990 by the Secretary-General of the time and again in 2001 by the current Secretary-General. Other, perhaps less "mainstream", suggestions that had been made included the idea of authorizing national supreme courts and international courts to request advisory opinions on difficult or disputed questions of international law.

78. He did not claim that any of the options put forward represented a definitive way of reinvigorating the Court's advisory procedure. He merely drew attention to them in order to stimulate debate among policy makers. The advisory procedure had some clear advantages: it could contribute to the progress of international law but combined the judicial approach with the flexibility offered by the fact that its opinions were not binding.

79. **Mr. Kanu** (Sierra Leone) said that the President of the International Court of Justice had made a number of extremely thought-provoking suggestions. In particular, with regard to the fact that the parties requesting an advisory opinion were not obliged to accept that opinion, the United Nations should find some way of addressing the question. There was no point in requesting an advisory opinion unless some way could be found of ensuring that it was respected by the parties concerned.

80. **Mr. Shi Jiuyong** (President of the International Court of Justice) said that the Court adhered strictly to its Statute, under which advisory opinions had no binding force. Nonetheless, international organizations — and, in particular, the General Assembly — had always fully respected the Court's advisory opinions.

The meeting rose at 12.45 p.m.

United Nations A/C.6/59/SR.22

General Assembly
Fifty-ninth session

Official Records

Distr.: General
16 November 2004

Original: English

Sixth Committee

Summary record of the 22nd meeting

Held at Headquarters, New York, on Friday, 5 November 2004, at 2.30 p.m.

Chairman: Mr. Dhakal (Vice-Chairman) .... (Nepal)

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In the absence of Mr. Bennouna (Morocco), Mr. Dhakal (Nepal), Vice-Chairman, took the Chair.

The meeting was called to order at 2.40 p.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (A/59/10) (*continued*)

1. **Mr. Henczel** (Poland), referring to chapter V of the report of the International Law Commission (A/59/10), said he would deal with the issues that the Special Rapporteur on responsibility of international organizations intended to address in his third report, due in 2005. On the question of breach of an international obligation, he said that relations between an international organization and its member States were mostly governed by the rules of the organization. It should be borne in mind, however, that the organization itself and its member States were separate subjects of international law. Moreover, the ties between the organization and its member States could be relatively loose. Thus, the law of international organizations could not, in many cases, be defined as a self-contained regime. Under those circumstances, the law of responsibility would often play at least a subsidiary role in the relations between the organization and its member States. Therefore, it seemed justified that breaches of obligations that an international organization might have towards its member States or its agents should be considered by the Commission in its study.

2. On the question of circumstances precluding wrongfulness, he said that the international legal concept of the state of necessity was strictly connected with the international position of States, and not with that of international organizations. Although in some situations the activities and essential interests of the organization might be threatened by a grave and imminent peril, the position of the organization could not be compared with the position of States, for example, in respect of the consequences of a possible disappearance of the organization. Therefore, his delegation suggested that the report should omit the state of necessity as a circumstance precluding wrongfulness.

3. On the matter of the responsibility of an international organization in connection with a wrongful act of a State or another organization, the Polish delegation was of the opinion that when the international organization was requesting a member State to undertake specific conduct, the responsibility for breaches of international law should be attributed to that organization if, according to the rules of the organization, compliance with such a request was mandatory for member States. The situation seemed slightly different in cases where the organization authorized member States to act but did not impose upon them any particular conduct. He referred in that respect to the practice of the European Court of Human Rights relating to the control of acts of States in implementation of European Community law.

4. **Mr. Dolatyar** (Islamic Republic of Iran) referred to paragraph 25 of the report, in which the Commission sought views and comments from Member States. Draft article 3 (2) cast light on some aspects of the question of the responsibility of a member State and an international organization when the State acted in compliance with a request or authorization of the organization and the conduct appeared to be in breach of an international obligation of both the State and the organization. Cases in which an international organization gave authorization to its member States for certain conduct should be differentiated from those in which the organization requested them to engage in such conduct. By authorizing a member State, the organization conferred on it a right to become involved in a situation. In such cases, the authorized State was exercising a right, not an obligation or a duty, to take action. Consequently, its conduct should be considered its own rather than that of the organization. During the past decade there had been a number of cases in which the United Nations Security Council had authorized Member States to take measures in respect of certain situations. In no case had the United Nations been held responsible for actions that a Member State had taken under that authorization.

5. With regard to the attribution of conduct, draft article 4 articulated a general rule that governed both acts and omissions. That was in conformity with the provision of draft article 3 (2), which pointed out that conduct consisted of an action or omission. Though identification and attribution of cases of omission seemed more difficult, for the sake of clarity, the phrase "or omissions" should be inserted after the word "acts" in draft article 4 (1).

6. His delegation agreed with the content of draft article 5. Noting that the Commission had not given any definition of "effective control", he suggested that

the relevant provisions of the Commission's draft articles on State responsibility could be helpful in that regard.

7. **Mr. Abraham** (France) said that his delegation had no difficulties with the draft articles on responsibility of international organizations. Draft article 4 provided that the rules of the organization should not be the only criterion for determining the functions of its organs and agents. The definition of "rules of the organization" was based on, and supplemented, the definition contained in article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. That definition and the definition of agent were both broad and specific enough to allow for different situations in which conduct might be attributed to an organization.

8. Draft article 5 dealt with an issue that might pose the greatest problem in terms of attribution. As noted in the commentary, the draft envisaged the case of military contingents that a State placed at the disposal of an international organization, such as the United Nations, for a peacekeeping operation. The Commission had settled on effective control as a criterion for attribution of conduct, and that would appear to be the most sensible approach. It was, however, important not to overlook the differences of interpretation which might arise in that connection. The adoption of draft article 5 did not resolve all the issues involved. The Special Rapporteur and the Commission should explore the subject in greater depth.

9. According to the commentary, draft article 6 dealt with conduct that might exceed the competence of the organization, not just that of the subsidiary organ. He wondered whether it might not be preferable for that point to be expressly stated in the draft article, particularly since draft article 4 referred to the rules of the organization, including "decisions, resolutions and other acts taken by the organization in accordance with those instruments".

10. Draft article 7 mirrored, mutatis mutandis, the wording of article 11 of the draft articles on State responsibility and did not present any particular problem. The commentary noted that in certain instances of practice, it might not be clear whether what was involved by the acknowledgement was attribution of conduct or responsibility. If it was necessary to make a clear distinction between attribution of conduct and attribution of responsibility, it was important to stress that the responsibility of an international organization was at issue because conduct involving a breach of an international obligation might be attributed to it. In the cases mentioned by the Commission, the attribution of responsibility reflected the conviction of the international organizations that the conduct in question could, at least partly, be attributed to them.

11. Turning to the issues on which the Commission requested the views of States, he said that the question of breaches of the law of the organization should not be excluded from the Commission's work, even though the scope of its work in that area would obviously be limited by the primacy of *lex specialis*.

12. Concerning the transposition of article 25 of the draft articles on State responsibility, on state of necessity, his delegation did not see any reason that would justify the decision to eliminate the circumstance precluding wrongfulness or to make it contingent upon other conditions. Nevertheless, as in the case of States, circumstances that might make it necessary to invoke necessity would rarely occur in practice.

13. The Commission had also asked whether an international organization could be held responsible in the event that a certain conduct which a member State took in compliance with a request on the part of the international organization appeared to be in breach of an international obligation both of that State and of that organization. The question was a complex one and could not be answered as easily as one might think. If the international organization merely authorized the conduct of the State that constituted a breach of their international obligations, the responsibility of each one should be assessed separately. The question also arose as to whether the authorization by the organization might not in itself be a breach of its obligations and whether the wrongfulness of the State's conduct could be excluded based on the authorization it had received, which he doubted. In cases where the organization requested the State to adopt the wrongful conduct, the responsibility of one or the other would depend to a large extent on how much latitude the State was allowed by the organization's request.

14. **Mr. Panevkin** (Russian Federation), referring to chapter VI of the report, said that he concurred with

the conclusion of the Special Rapporteur that further study of the topic was needed, particularly given the problem of ascertaining the existence of groundwaters that were not connected with surface waters and therefore did not fall under the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. The scarcity of State practice had made it difficult for the Commission to gather information from States on the issue. In agreements on the protection and use of transboundary watercourses between the Russian Federation and neighbouring States, for example, the question of such groundwaters had not been addressed specifically. His delegation would be submitting to the Commission its replies to the questionnaire circulated by the Secretariat on 23 September 2004.

15. In deciding to drop the notion of "confined transboundary groundwaters", the Special Rapporteur had chosen the right approach to the topic by focusing largely on the Convention. The Convention on Protection and Use of Transboundary Watercourses and International Lakes should also be taken into account, even though it was regional in nature, as it established several basic principles for the protection and use of transboundary watercourses regardless of whether they were surface waters or groundwaters.

16. In cases where the groundwaters in a given study had special characteristics, such as non-renewable transboundary aquifer systems, there was a need for further analysis of the concept of "transboundary harm" put forward in the draft articles. It was unclear, for example, whether transboundary harm was caused where a single neighbouring State lowered the volume of water in a shared aquifer system through use within its territory or where States used the resources of the aquifer system to varying degrees.

17. Regardless of the outcome of the Commission's work on the topic, the results should be in the form of a framework. They might serve as a guideline for States in concluding bilateral and regional agreements.

18. **Mr. Buhler** (Austria) said that his delegation had doubts as to whether the definition, in draft article 4 of the term "agent" as a person "through whom the organization acts" was a workable definition in the legal sense. If the conduct of an agent could be attributed to an international organization, the latter was acting "through that person". The phrase "through whom the organization acts" identified the legal consequences of the attribution of conduct, but did not define the term "agent". For that reason, paragraph 2 should be based on the full wording of the relevant definition given by the International Court of Justice in its advisory opinion on "Reparation for injuries suffered in the service of the United Nations", not only on the short version in the final part that was mentioned in the commentary on draft article 4. Therefore, draft article 4 should be based on article 5 of the articles on State responsibility rather than on article 4. The definition could thus be formulated as follows:

> "An 'agent' or 'organ' of an international organization is a person or entity that has been charged by that organization with carrying out, or helping to carry out, one of its functions, provided the agent or organ is acting in that capacity in the particular instance."

19. In comparison to article 6 on State responsibility, current draft article 5 on responsibility of international organizations contained a different criterion for the attribution of conduct. The decisive criterion in article 6 on State responsibility was the exercise of elements of governmental authority of the State at whose disposal the organ was placed. In current draft article 5, the criterion was effective control over conduct. It might be asked whether the criterion of control was enough or whether the exercise of functions of the organization should be included as an additional criterion.

20. Furthermore, draft article 5 was limited to organs of a State or organs or agents of another international organization, but did not include private persons. It was unclear, however, whether or not the act of a private person acting under the effective control of an organization would entail the organization's responsibility. He wished to know what the reason might be for excluding the situation of private persons acting in such a way. If, for instance, a person in the service of a non-governmental organization acted under the effective control of the United Nations in the course of a peacekeeping operation, such an act would certainly be attributable to the United Nations. It was difficult to see any distinction between such a case and a situation where a State organ was acting in such a manner.

21. An answer could, of course, be sought in the formulation of draft article 4, according to which an

agent was any person through whom the organization acted. That would, however, also apply to foreign State organs. But if foreign State organs (who were persons) were not covered by draft article 4, private persons who only incidentally acted under the effective control of an organization would likewise not be covered by draft article 4. It seemed that draft articles 4 and 5 needed harmonization in order to cover all possible situations. In that context, consideration might be given to adopting the approach taken in draft article 8 on State responsibility, which referred to the situation of control but was not limited to foreign State organs.

22. Turning to the questions posed by the Commission to member States (A/59/10, para. 25), he said that with regard to question (a), concerning the interrelations between an international organization and its member States or its agents, Austria believed that the Commission should not consider breaches of obligations that an international organization might have towards its agents, since that would rather be a matter of internal administrative law. However, the Commission should include general rules of responsibility for cases in which an organization breached obligations towards its member States. The legal consequences of an ultra vires act of an international organization towards its member States could be of special concern. A second crucial issue concerned the legal consequences of the conduct of member States within the organs of the responsible organization.

23. Regarding question (b), it should be noted that owing to a lack of practice with respect to the state of necessity of an international organization, any future draft article would be based on purely theoretical grounds. However, his delegation saw no reason why a provision on necessity should not be included in the draft articles.

24. As to question (c), his delegation was of the view that an international organization could be held responsible under international law if it requested a member State to perform a specific act in violation of international law. Whereas the responsibility of the member State was linked to the attribution of the violating act, the responsibility of the international organization was linked to the attribution of the request to perform the act in question. In that context, the difficult question would be whether an international organization could be held responsible for a request or an authorization in cases where the request or authorization was not prohibited by the international obligation in breach. Certainly, from the perspective of justice, an international organization should not be allowed to escape responsibility by "outsourcing" its actors.

25. Turning to the topic of shared natural resources (A/59/10, chap. VI), he said that Austria regarded the general framework presented by the Special Rapporteur as a good starting point for the further work of the Commission. Austria agreed with the Special Rapporteur that the term "aquifer" should be used instead of "confined transboundary groundwaters". To limit the scope of the articles to "transboundary aquifers" seemed reasonable, although his delegation would welcome more information from technical experts on the viability of the concept in view of the factual nature of "aquifers". The concept of "exploitability", to which draft article 2 (a) referred, raised a number of questions, such as the existence of the technical capabilities to "exploit" aquifers. Therefore, Austria suggested that the word "exploitable" should be either deleted or defined more precisely.

26. It was essential that States should try to acquire information about the factual nature of "aquifers" which they were using or intended to use. That need to acquire information should be reflected in the general principles in Part II. Draft article 7 on the relationship between different kinds of uses was in line with the careful compromise reflected in article 10 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.

27. With regard to the relationship between the 1997 Convention and any international instrument concerning groundwater, his delegation believed that it was too early to discuss the question, as it would depend very much on the content and legal form of the draft articles. His delegation agreed with the Special Rapporteur that a decision on the legal form should only be taken once the content had become more precise.

28. Moreover, the formulation of universal rules by the Commission was to be seen as providing guidance for regional arrangements. It would then be up to the States to enter into regional arrangements which took into account the specific characteristics and circumstances of regional aquifers.

29. **Mr. Wickremasinghe** (United Kingdom) said that it remained to be seen whether the Commission's decision to model the draft articles on responsibility of international organizations after its successful work on the topic of State responsibility was appropriate. His delegation had suggested that the Commission should step back, take stock of existing law and practice in that area, and explore some of the particular problems related to the effort to codify the law of international organizations.

30. The attempt to deal with organs of an organization and its agents in the same provision (draft article 4 (1)), while understandable, had led to a lack of clarity; in relation to the conduct of agents, the words "in his or her official capacity" might be a clearer basis for attribution than "in the performance of the functions".

31. The commentary on draft article 5 suggested that the test of "effective control" was based largely on practice relating to peacekeeping operations; that test might not be appropriate to the breadth of situations to which the draft article potentially applied.

32. With respect to the issues raised in paragraph 25 of the report, he suggested that the Commission should keep an open mind on the scope of its work in relation to an international organization's responsibility to its member States or its agents for breaches of its own internal law; there could be significant practice in that area which might provide guidance on the handling of external obligations.

33. There could be no simple, generally applicable answer to the question of an international organization's responsibility for the conduct of a member State that was requested or authorized by that organization in violation of an obligation owed by both the organization and the member State; much would depend on the organization in question and on the circumstances.

34. With regard to the topic of shared natural resources, the United Kingdom had considerable experience with transboundary resources other than groundwaters, in relation to which solutions were often found on a case-by-case basis.

35. Turning to the topic of reservations to treaties (A/59/10, chap. IX), it was difficult to define objections to reservations by their effects before undertaking substantive work on the effects of reservations. The current definition did not fully convey the contractual nature of the process of making reservations and objections; however, it could be used as a working draft and revised, if necessary, at a later stage.

36. His delegation continued to have doubts regarding the inclusion of the draft guideline on widening the scope of reservations for the same reason that it would oppose the inclusion of a draft guideline on late reservations; it was not clear how the draft guidelines would really discourage such practices.

37. Lastly, the United Kingdom reserved its position regarding the outcome of the Commission's work on the fragmentation of international law, while looking forward to seeing how that work developed in the future.

38. **Mr. Tavares** (Portugal) stressed that the draft articles on the responsibility of States for internationally wrongful acts could provide only a starting point for the Commission's study of the topic of responsibility of international organizations; such organizations were subjects of international law which differed from States in several respects, including their greater degree of diversity and the types of relations that could be established between them and their member States.

39. His delegation had doubts regarding the inclusion of the phrase "whatever position the organ or agent holds in respect of the organization" in draft article 4 (1), since it was clear from (2) and (3) that the position would be defined in the rules of the organization.

40. In draft article 4 (4), the words "decisions and resolutions" were unnecessary; a single reference to the "acts of the organization" would suffice. It was also doubtful that the reference to "established practice" was appropriate, since the activities and powers of an international organization depended upon its purposes and functions, as specified in its constituent documents. The current wording of (4), which could suggest that an organization's established practice was relevant to the creation of customary rules *contra legem*, should be replaced by the following: "For the purpose of the present draft article, 'rules of the organization' means the constituent instruments and other acts taken by the organization in accordance with those instruments".

41. With respect to draft article 5, he was concerned at the lack of references to established practice or customary law in support of the idea that an organ of a State could be at the disposal or under the effective control of an international organization; he would prefer to speak only of agents of international organizations. Moreover, as the Special Rapporteur had noted, established practice focused on attribution of responsibility rather than attribution of conduct (A/59/10, para. 72 (3)).

42. Lastly, his delegation would prefer to delete article 7, as it was an instance in which a rule that made sense in the context of States was inconceivable in the context of international organizations. An act which was not attributable to an organization under international law could not be attributed to it by other means, including the organization's own will.

43. **Ms. Kamenkova** (Belarus) said that the rules on attribution of conduct of international organizations were of fundamental significance for successful work on all topics relating to the responsibility of international organizations. The most successful of the draft articles was article 4, which provided a general rule on attribution of conduct to an international organization in the context of the conduct of the organ or agent of the international organization. Her delegation commended the inclusion of the terms "agent" and "rules of the organization" in that article. In future, such definitions should be moved to article 2 on use of terms, because they could be used in other draft articles. In particular, the term "rules of the organization" might be very useful in drafting rules on the responsibility of an international organization in connection with the wrongful act of a State or another organization. The term "agent" covered a very wide variety of categories of natural and legal persons or entities entrusted with the functions of the international organizations.

44. In draft article 5, there was a need for a clear definition of the term "effective control" as a criterion for attribution to an international organization of the conduct of a State organ that was placed at the disposal of the organization, such as national contingents for peacekeeping. The third report of the Special Rapporteur must give particular attention to drafting proposals to establish the further responsibility of an international organization for wrongful acts of member States if they were committed under the international organization's direction or effective control. The authorization by international organizations of conduct not under their direction or effective control did not exonerate them from responsibility for the commission of wrongful acts. However, in such cases, the main responsibility rested with the States directly involved in the commission of internationally wrongful acts. Strengthening such rules in the draft articles might promote a more thorough and balanced international legal evaluation of decisions taken on urgent international matters in the framework of international organizations, in particular the decisions of the Security Council.

45. There was no need to strengthen the notion of "absolute necessity" as a circumstance precluding wrongfulness. Invoking the necessity for an international organization to commit internationally wrongful acts in order to safeguard an essential interest against a grave and imminent peril could result in ambiguity and in unprincipled interpretations of the nature and motives of those acts. International organizations must be put in a much stricter international legal framework, in terms of responsibility, than States because they were multilateral institutions whose actions had particular significance for confirming the supremacy of law in international relations.

46. **Ms. Escobar Hernández** (Spain) endorsed the Commission's decision to model the draft articles on responsibility of international organizations after the draft articles on responsibility of States for internationally wrongful acts. She welcomed the seven draft articles on the first topic that the Commission had adopted thus far and urged the Commission to continue to involve international organizations in its work.

47. Turning to the issues on which comments had been requested from Governments, she said that while it might initially appear that the Commission should include in its consideration of responsibility of international organizations, breaches of an international organization's obligations towards its member States or its agents, the boundaries of that issue must be clearly defined.

48. First, it was important to take into account the organization's relationship with its member States and its agents. Second, such breaches would normally be addressed by the organization's own rules, and it must be determined whether any legal consequences could be extrapolated from the nature and scope of that

obligation. Third, the question of whether the organization had independent tribunals or other mechanisms for establishing the consequences of a breach of its obligations, without the necessity of recourse to other rules or mechanisms of general international law, must be considered. Any attempt to address the issue without taking those factors into account could damage the complex mechanism governing the activities of international organizations.

49. While her delegation was not, in principle, opposed to the possibility of an international organization's invoking a state of necessity, it was essential to conduct a full study of the practice of such organizations before taking a decision in the matter.

50. The question of whether an international organization should be regarded as responsible for a member State's conduct might depend on whether that conduct had been requested or merely authorized by the organization. It would appear that, in either case, the organization would be held responsible for the breach because of its involvement in the chain of circumstances that led to it. However, in the light of the serious consequences of such a conclusion, the Special Rapporteur should conduct a study of practice in that area.

51. **Ms. Ow** (Singapore) endorsed the phased approach to the topic of responsibility of international organizations, beginning with the establishment of a set of criteria for the attribution of conduct. She agreed that it was unnecessary to replicate the issues addressed in articles 9 and 10 of the articles on State responsibility in the context of international organizations.

52. Her delegation concurred with the general thrust of draft articles 4 and 6 and of the commentary thereon, which reflected the practical realities of international organizations and were sufficiently flexible to take into account the varying functions and structure of such organizations.

53 It would be useful to examine draft article 5, which was relevant to military contingents placed at the disposal of the United Nations for peacekeeping operations, in relation to troop contribution agreements, the responsibility of the contributing State and international humanitarian law. In that context, the question of attribution of conduct might be better considered in conjunction with that of attribution of liability; the issue would benefit from further discussion.

54. As there was little jurisprudence concerning the issue of conduct acknowledged by an international organization (draft article 7), it might be necessary to consider how such a scenario was likely to arise, the policy considerations militating for and against such a principle and the relationship between draft article 7 and draft articles 4 and 6.

55. Turning to the issue of the future work of the Commission, she endorsed the topics which the Special Rapporteur planned to address in his third report (A/59/10, para. 25). On the topic of breach of an international obligation, the study could usefully draw on the analogous principles set forth in chapter III of the articles on State responsibility. Moreover, it was equally important that any obligations which an international organization was alleged to have breached be shown to have been recognized and accepted by the international community.

56. Her delegation doubted that breaches of an international organization's obligations towards its member States or its agents should be included in the scope of the study. There was no international consensus on the legal nature of an organization's rules in relation to international law. Moreover, variations in the nature and functions of different organizations might not lend themselves to a study of that type.

57. On the question of circumstances precluding wrongfulness, it would be useful to explore the context in which such a rule might be applicable and the specific principles which might be invoked. for instance, the question of whether a state of necessity, similar to that cited in article 25 of the articles on State responsibility could be invoked vis-à-vis an international organization remained to be clarified; the same was true for the question of how the reference to "the only way for the State to safeguard an essential interest against a grave and imminent peril" could be appropriately transposed to an international organization. She wondered whether there was a common understanding of what constituted such a peril to an international organization and whether that notion was even relevant to such entities.

58. Other issues which would need to be considered included the extent to which a member State's act was requested or authorized by an international organization and the degree of control, if any,

exercised by that organization. What remained critical was the link to a clear obligation which would be violated if the conduct was performed by the organization itself.

59. **Mr. Kendal** (Denmark), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), and referring to the topic of responsibility of international organizations, said that the Nordic countries fully shared the points made by the representative of the Netherlands on issues relating to the European Community.

60. The Special Rapporteur had received useful submissions on the practice of international organizations and the descriptions of practice in his report were crucial in providing an overview of the subject and establishing the practical framework for the Commission's work. The diversity of international organizations was a key challenge in the process of producing a coherent set of draft articles, and more of those organizations should be encouraged to provide information on their practice.

61. In draft article 4, paragraph 4, the Commission had opted to use the term "established practice" when defining "rules of the organization". While agreeing that practice was relevant when seeking to determine the organs or agents that acted on behalf of an organization, the Nordic countries questioned whether the article as drafted reflected the Special Rapporteur's thinking about the use of the term "established".

62. In draft article 5, the criterion of whether the organization exercised effective control over the conduct of organs placed at the disposal of an international organization by a State or another international organization would seem correct in the case of peacekeeping and other military operations. However, it appeared to be less adequate for deciding attribution in the case of other types of cooperation between international organizations and States or other international organizations, and it might be useful for the Commission to take a closer look at other such types of cooperation and their relevance for defining the criteria for attribution.

63. Draft article 5 also related to the case of troop-contributing countries retaining criminal jurisdiction over troops and the relevance of the question of "effective control" and hence attribution. Even though that meant that contributing States retained certain powers, he cautioned against placing too much emphasis on determining the question of effective control of conduct. The framework for establishing individual responsibility for acts was, to some extent, governed by different criteria than the framework for deciding attribution of conduct to either an organization or a State.

64. As to the questions that the Commission had addressed to Governments (A/59/10, para. 25) with regard to question (a), the Nordic Group agreed that it was not easy to define precisely the nature of "rules of the organization" under international law, since they covered a wide range of norms and practices. It followed from draft article 3, however, that every breach of an international obligation by an international organization in principle entailed the latter's responsibility. Consequently, it could not be excluded that an organization's breach of the "rules of the organization" vis-à-vis a member State might entail its responsibility.

65. The issue of necessity addressed in question (b) merited further study. It was possible that the "essential interests" of an organization could be identified; thus, the safeguarding of such interests should, as in the case of the rules on State responsibility, preclude wrongfulness.

66. Lastly, question (c) introduced a distinction between the responsibility of an organization for the conduct of a member State when the organization requested, as opposed to authorized, such an action. As in the case of the "effective control" criteria in draft article 4, it appeared essential to find the point where the member State could be said to have so little "room for manoeuvre" that it would seem unreasonable to make it solely responsible for certain conduct. It was also important to focus on the actual situation leading to the act or omission entailing responsibility, as well as the more formal question of whether a resolution used the expression "authorize" or "request", or any other term, including when an organization, through a binding decision, obliged the member State to act.

67. **Mr. Aljadey** (Libyan Arab Jamahiriya) said that adherence to the condition that the act entailing the responsibility of an international organization should be wrongful under international law posed two difficulties, one relating to the responsibility of States and the other to the responsibility of legal entities under internal law. In the case of the former, it was now acceptable for States to be held liable for their

injurious acts in instances not prohibited by international law, and the Committee was endeavouring to draft articles to that effect. The same could also apply to international organizations, since acts undertaken by them that were not prohibited by international law might nevertheless cause injury to States or individuals, thus giving rise to the question of liability and of whether the same rules that obtained for State liability should apply. Those draft articles, however, made no provision for the various legal theories concerning no-fault liability that were frequently echoed in the internal laws of many States. Where injury resulted from the proper conduct of an international organization and it was subsequently found that the justifications for such conduct were improper or illegal, it was only fair that the organization concerned should be held responsible for its action.

68. The topic of responsibility of international organizations gave rise to complex legal issues that should be thoroughly explored in order to produce carefully balanced wording on the subject. That same subject had been raised with the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization in connection with the right of a State to compensation for injury arising out of an act or decision of an international organization. In the same way, his delegation felt that the Commission should devote due attention to ensuring that the draft articles addressed the concerns of various States on a topic of such importance.

69. **Mr. Buchwald** (United States of America) said that the issue of responsibility of international organizations was complex, since such organizations varied greatly in their functions and structure. That made it difficult to define "international organization" for the purpose of developing and applying a set of articles or rules.

70. One of the issues under consideration concerned the differences between States and international organizations and it was important that such differences be kept in mind as work proceeded. For example, the relationship between an individual and his country of nationality was significantly different from that between an individual and an international organization that employed him. That raised the issue of the extent to which it was appropriate to make analogies between principles of attribution and responsibility applicable to States and those applicable to international organizations.

71. His delegation intended to submit written views on the scope of the Commission's study, the possibility of a necessity defence for international organizations, and the responsibility of international organizations for State actions requested or authorized by an international organization. Particular emphasis should be placed on relevant practice. The Commission should avoid developing rules in the area of international organizations that merely paralleled the rules set forth in the draft articles on State responsibility. Instead, it should carefully assess the unique considerations relevant to international organizations.

72. On the topic of shared natural resources, there was still much to learn about transboundary aquifers in general, and specific aquifer conditions and State practice varied widely. His delegation considered that context-specific arrangements were the best way to address pressures on transboundary groundwaters, and would favour a final form that gave States flexibility to tailor agreements or arrangements to suit their circumstances, such as guidelines that could be used to negotiate bilateral or regional arrangements.

73. **Mr. Pecsteen** (Belgium), referring to the questions posed by the Commission to member States (A/59/10, para. 25) said, in answer to question (a), that the responsibility of international organizations vis-à-vis their member States should not be dealt with as such in the context of the current study. The issue fell within the purview of international civil service law and it would be difficult to deal with it without becoming involved in a much more complex task of codification. However, the general rules identified by the Commission with regard to the responsibility of international organizations, particularly in relation to individuals, could apply, mutatis mutandis, to the relationship between an international organization and its agents.

74. The relationship between an international organization and its member States was more complex. It was difficult to draw an exact line between the responsibility of an international organization vis-à-vis a member or a non-member State, or another international organization, and the responsibility of an international organization vis-à-vis its members alone, whether States or international organizations.

75. If the responsibility of an international organization vis-à-vis its members was limited to problems relating to the internal rules of the international organization, that aspect could be excluded from the draft articles. However, it was not easy to delimit the internal rules of an international organization. Thus, implementation of the decisions of an international organization could be a matter both of its internal rules and of general international law. Nevertheless, if an act of an international organization violated a rule of international law, which existed independently of the internal rules of the international organization, the matter entered into the scope of the Commission's study.

76. With regard to question (b), the draft articles on responsibility of States identified "necessity" as a circumstance precluding wrongfulness, when the act not in conformity with an international obligation of the State was the only way for the State to safeguard an essential interest against a grave and imminent peril (art. 25). Evidently, "essential interest" was more easily understood in the case of States than of organizations. However, James Crawford had noted that what constituted an essential interest could not be defined in the abstract and a priori; all the circumstances of the case had to be taken into account in order to evaluate the "essential" nature of the interest to be protected by failing to comply with a specific international obligation. Understood in that way, there was no reason to preclude an international organization from invoking the protection of a similar interest to justify failure to comply with an international obligation.

77. Circumstances precluding wrongfulness appeared to have been embodied in numerous European Community bilateral cooperation agreements. Such agreements provided for the possibility of adopting safeguard measures, involving a failure to respect the terms of the agreements, if serious disturbances occurred in a sector of economic activity or if difficulties arose that could result in the deterioration of the regional economic situation. That one of the parties to the agreements in question was an international organization, rather than a State, did not appear to change anything. Consequently, there appeared to be no specific reason for excluding the possibility of international organizations invoking "necessity" as a circumstance precluding wrongfulness, on the understanding that it should be subject to the same requirements as those established for States.

78. Question (c) was somewhat ambiguous and could cover several very different situations. It appeared advisable to formulate the question more precisely, with examples of the type of situation envisaged.

79. **Mr. Troncoso** (Chile), referring to the topic of diplomatic protection (A/59/10, chap. IV), said that his delegation supported the Commission's approach to the draft articles, namely, dealing with the secondary rules and not the primary rules. His delegation agreed that the draft articles should refer to the conditions that must be met in order to bring a claim for diplomatic protection, and that the topic of protection should be considered in relation to both natural persons and legal persons. Furthermore, the draft articles should be limited to diplomatic protection and should not deal with so-called "functional protection", which referred to agents of an international organization.

80. His delegation approved of draft article 1 on the definition and scope of international protection and agreed that the draft articles should not seek to describe internationally wrongful acts giving rise to diplomatic protection. It was particularly relevant to stress, in draft article 2, that diplomatic protection was vested in the State and was therefore a discretionary act of the State. Although that idea was clearly stated in the commentary, the article tended to emphasize the way protection should be exercised rather than the fact that it was a State prerogative.

81. Although the expression "continuous" nationality appeared in the title of draft article 5, it did not appear in the text, which stated only that a person should be a national of the country providing protection on two occasions: when an injury occurred and when the claim was presented. Although the Commission suggested that it was unnecessary to use the term "continuous", because it would encompassed a very unusual circumstance, the concept was to provide a safeguard against a situation in which a person changed his nationality merely to obtain diplomatic protection from a more influential State.

82. With regard to the exercise of protection in cases of multiple nationality (draft article 6), and specifically to the commentary made by the Commission on the term "jointly" which appeared in paragraph 2, the Commission's view seemed to be that the term allowed States to exercise protection separately or in different forums. That premise would be covered by paragraph 1; consequently, the term "jointly" should be understood strictu senso, namely, as an identical action, as in the case of collective claims or actions.

83. His delegation agreed that a State should be allowed to exercise protection in respect of a stateless person or a refugee. In its commentary, the Commission stated that the term "refugee" was not limited to the category of persons defined in the 1951 Convention Relating to the Status of Refugees. If that was so, it should be stated more firmly in the article.

84. Turning to the topic of unilateral acts of States (A/59/10, chap. VIII), his Government recognized such acts as a source of international obligations. His delegation agreed that the next step could be the elaboration of a draft definition of unilateral acts based on the operative text adopted by the Working Group in 2003, together with the formulation of some general rules for all the unilateral acts and declarations considered by the Special Rapporteur, in the light of State practice. It would also be useful to continue examining State practice with regard to the evolution of the acts and declarations examined in the report, including aspects relating to the author of the act, its form, its subjective elements, the reactions of third States, and its revocability and validity.

85. Even though the elaboration of draft articles establishing a regime applicable to all unilateral acts and declarations could be a very substantial task, the efforts made to date should not be abandoned. If it was not possible to elaborate a draft convention, the Commission could formulate some guidelines for State practice, which would also make a useful contribution to international case law and legal doctrine. Lastly, a new working group could be established to undertake a critical examination of the practice compiled in the seventh report and to establish principles to guide the continuation of the Special Rapporteur's work.

86. The Special Rapporteur on reservations to treaties (A/59/10, chap. IX) intended to deal with the question of the validity of reservations in his next report. The Vienna Conventions on the Law of Treaties covered cases where a State or an international organization could not formulate a reservation to a treaty (art. 19); but they failed to regulate what happened when a State or an international organization formulated a reservation despite that prohibition. His delegation agreed with the Special Rapporteur that a "prohibited" reservation needed to be defined and recommended that he include that task in his forthcoming guidelines.

87. His delegation agreed that the adjective "unlawful" was inappropriate to qualify a reservation; it was prohibited conduct, but normally it would be precluded by other States rejecting the source of the reservation, so that responsibility would not be involved. Nor did his delegation approve of the term "validity", because that referred to the reasons for the nullity, which were not necessarily present in a situation such as the one under consideration, namely, prohibited reservations. There could be invalid reservations that were not prohibited. Thus, there were two separate categories. Moreover, the term "invalid" could be confused with a case in which there was an "invalid" reservation, for example, one formulated by an agent who was not authorized to represent the State for that purpose. Therefore, the term "admissible" or a word with a similar meaning would be more appropriate. However, a further problem could be the determination of whether such inadmissibility could be alleged by the depositary directly or whether it should be alleged by the States under the usual system of individual assessment of reservations.

88. Although, in principle, the enlargement of the scope of an existing reservation and the late formulation of a reservation should not be prohibited, unless there was a treaty provision to that effect, such situations should be considered very exceptional within the law of treaties.

89. The Special Rapporteur's ninth report referred essentially to the definition of an "objection to a reservation"; it would be useful to clarify what was understood by an objection, and its scope. A definition would avoid the possibility of an objecting State causing its objection to have inappropriate effects. It was also useful to make a distinction between an objection, as such, and mere comments on or interpretations of a reservation. An objection could not have the super maximum effect referred to in the text, i.e., that of invalidating or rendering meaningless the will of the entity formulating it. While the super maximum effect was inadmissible, in principle, the Special Rapporteur could examine it in relation to cases where there was a prohibited reservation, whose effects the objector should be able to oppose fully and absolutely; in that situation, there could be a system such as the super maximum effect.

The meeting rose at 4.50 p.m.